In the Supreme Court of the United States

October Term, 1976
No. 76-1301

COMMONWEALTH OF PENNSYLVANIA
et al.,
Petitioner

vs.

THOMAS S. KLEPPE et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND APPENDIX

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. ——

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners

v.

THOMAS S. KLEPPE, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Commonwealth of Pennsylvania and those it represents hereby petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which was entered in this case on March 4, 1976.

I. OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 533 Fed. 2d 68. Those opinions are also set out in the Appendix at 22a-52a. The District Court acted without opinion; however its final order is set forth at 20a of the Appendix.

II. JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1976, and petitioner's timely request for rehearing was denied on May 3, 1976 (52a). *Department of Banking v. Pink*, 317 U.S. 264 (1942). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

III. QUESTION PRESENTED

This petition raises the question of whether the Commonwealth of Pennsylvania has standing to sue the Small Business Administration and certain of its officials as *parens patriae,* and in its own behalf as a party harmed. Pennsylvania seeks to challenge allegedly illegal conduct by the respondents in the administration of disaster relief, which relief was necessitated by Hurricane Agnes. The Court of Appeals for the District of Columbia Circuit, one judge dissenting, held that Pennsylvania lacked standing to maintain this action both as *parens patriae* and in its own behalf. Therefore, the following question is presented:

> Whether Pennsylvania has standing to sue an agency of the federal government, and certain of its officials, to challenge allegedly illegal actions by that agency, which harmed Pennsylvania and its citizens.

IV. STATEMENT OF THE CASE

Hurricane Agnes with its attendant floods ravaged the mid-Atlantic coastal region of the United States in late June of 1972. In its path, Pennsylvania suffered property and human losses unparalleled elsewhere. Those losses remain unprecedented in this country's history. On June 23, 1972, the President declared this a "major disaster" pursuant to the Disaster Relief Act of 1970.[1]

As a result of this Presidential declaration, the Small Business Administration,[2] utilizing its system of disaster priority classifications, designated the Commonwealth of Pennsylvania as a "Class B" disaster area for purposes of SBA disaster assistance (23a). This "A and B" system of disaster classification existed as the result of SBA regulations and is not found anywhere in the Act (45a n. 60). Under the Act, the SBA was authorized to provide financial assistance for property losses, whether those losses would be described as business, real, or personal.[3]

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[1] Disaster Relief Act of 1970, 84 Stat. 1744, 42 U.S.C. §§4401, 4402. Throughout the remainder of this Petition this statute may at times simply be referred to as "the Act". Moreover, this Act of 1970 has since been repealed by the Disaster Relief Act of 1974, 88 Stat. 143, 42 U.S.C. §5121 *et seq*. However, the 1970 Act was in effect during Agnes and its aftermath, and its alleged breach gave rise to this controversy.

[2] The Small Business Administration will be referred to as the "SBA" for the remainder of this Petition.

[3] Section 4451 of the Act, which provided the basis for the participation of the SBA in the overall disaster relief effort did not in any way limit SBA's participation to providing financial relief exclusively for businesses. Thus, the majority below was clearly in error by assuming that the SBA's role in providing disaster relief was for the ". . . narrow purpose of assisting small business. . ." (27a). See also the Small Business Act, 72 Stat. 384, as amended, 15 U.S.C. §§631, 636(b)(1).

The Commonwealth of Pennsylvania[4] believed then, and still believes, that its designation as a "B" disaster area was illegal. Accordingly, Pennsylvania instituted this action *parens patriae* on behalf of its citizens and on behalf of itself as a party harmed. The gravamen of the complaint was that the "B" designation was arbitrary and, therefore, done in violation of the Act (6a-10a). It was arbitrary because it relegated the entire State and its citizens to the lowest priority disaster relief effort even though its losses were, and remain, incomparable in their severity (6a-7a). And it was illegal because this classification was done for reasons other than those embodied in the Act, and was discriminatory in that less severe disasters had, on prior occasions, been treated as "A" disasters (8a). The SBA together with certain of its responsible officials were therefore named as defendants.

The complaint went on to allege that as a result of this "B" classification Pennsylvania and its citizens were denied the necessary "professional SBA personnel and administrative resources to effectively administer and deliver disaster recovery assistance. . ." (7a). Petitioner also alleged that these illegal actions caused general and severe economic harm to Pennsylvania's economy and the general welfare of its citizens (26a, 27a).[5] Petitioner there-

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[4] The Commonwealth of Pennsylvania may be referred to as "petitioner", and the federal defendants will be referred to as "respondents" throughout this Petition.

[5] The lower court described these allegations as ambiguous, however, two points must be made. First, the Petitioner was com-

fore sought injunctive relief to reopen the SBA disaster relief operation on a statewide basis (10a, 11a).

The respondents moved to dismiss the complaint asserting that Pennsylvania lacked standing to sue the United States either on its own behalf or in the *parens patriae* capacity. On August 9, 1974, without opinion, Chief Judge Jones dismissed the complaint "for lack of standing" (20a). An appeal was taken to the Court of Appeals for the District of Columbia Circuit and on March 4, 1976 that decision was affirmed by majority opinion with Senior Judge (formerly Chief Judge) Lumbard[6] dissenting. The respondents filed a timely petition for rehearing and suggestion for rehearing en banc pursuant to F.R.A.P. 40 which was denied on May 3, 1976.[7] Petitioner therefore seeks a writ of certiorari from that decision and final order of the Circuit Court.

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pletely foreclosed from *any* discovery or opportunity to amend its complaint prior to dismissal of the action; secondly, the Court completely mischaracterized the injury alleged as being uncompensated losses suffered by *small businesses*. The fact of the matter is that SBA's disaster relief responsibility ran to *all* persons who suffered property losses of any type. See n. 3 supra and n. 11 infra.

[6] Judge Lumbard is from the Second Circuit and sat by designation pursuant to 28 U.S.C. §294(d).

[7] Judge Lumbard voted to grant the petition.

V. REASONS FOR GRANTING THE WRIT

A. THE DECISION IN THIS CASE IS IN DIRECT CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

1. Parens Patriae Standing

In *Washington Utilities Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1975), the State of Washington, through its Utility and Transportation Commission, challenged the legality of certain actions of the Federal Communications Commission (FCC). The State alleged that two specific determinations of the FCC would have had an adverse economic impact, and therefore aggrieved both the general public and the State itself. Id. at 1140. Washington, like Pennsylvania in this case, asserted standing from two postures: as *parens patriae* on behalf of its citizens, and on behalf of itself as a party harmed. Similarily, in *Washington Utilities* the federal government moved to dismiss the State's challenge for lack of standing. While the substantive merits of Washington's claims are not relevant here, the Ninth Circuit's reasoning and resolution of the standing issue is critical.

In *Washington Utilities*, the Court held that the State of Washington had *parens patriae* standing to challenge the legality of the federal conduct there in question. Id. at 1152. The Court found that four, and possibly five factors[8]

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[8] In note 14 at p. 1152 of that opinion the *Washington Utilities* Court noted that in actions seeking only injunctive relief, such as

which existed in that case removed the initial barrier to Washington's *parens patriae* standing. Those elements, which also exist in this case, were: (1) a substantial portion of the State's citizens would be allegedly affected by the federal action; (2) separate actions by each individual affected was not a practicable remedy; (3) jeopardy of the general economic well-being of the community was alleged providing a sufficient independent interest for the State; (4) there existed joint federal-state governmental responsibilities in the area (utility regulation);[9] and (5) the absence of considerations traditio. ally used to justify limitations upon a state's *parens patriae* power to represent its citizens.[10] Id. at 1152.

Finally in that case, as here, the federal government asserted that this Court's holding in *Massachusetts v. Mellon,* 262 U.S. 447 (1923), barred the state from asserting its claims *parens patriae.* In *Mellon* the Commonwealth of Massachusetts, purporting to act as *parens*

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this case, the criteria for *parens patriae* standing may be alternative, and therefore need not exist simultaneously. In any event, all of the elements noted by the *Washington Utilities* Court are present in this case.

[9] This is the only factor which the majority even suggests distinguishes Pennsylvania's claim from that which was asserted in *Washington Utilities* (46a-47a) (but see discussion at pp. 11-12 infra, which clearly demonstrates that this element, whether or not it is critical, also exists in this case).

[10] These negative considerations, equally absent in t' 'i case, were (1) an attempt to utilize the original jurisdiction of this Court, (2) an attempt to evade the prohibitions of the Eleventh Amendment in a suit against another state, (3) the inherent risk of double recovery that exists in a *parens patriae* action for damages, and finally (4) the risk of barring an absent member of the public from pursuing any available alternative remedies. Id. at 1152-53.

patriae for its citizens, attempted to challenge the constitutionality of Congress legislating in the area of maternity care, and the constitutionality of the Act granting the federal government certain powers in that area. In that factual context the Court held that Massachusetts lacked *parens patriae* standing. However, the *Washington Utilities* court perceived the critical distinction:

> "The doctrine of *Massachusetts v. Mellon* is not applicable to this proceeding. Massachusetts had alleged that a federal statute was unconstitutional as a usurpation by Congress of power reserved to the states. As the Court pointed out in *Georgia v. Pennsylvania Railroad,* supra, Massachusetts sought to litigate a 'question of distribution of powers between the State and the national government' (324 U.S. at 445, 65 S. Ct. at 720), and 'protect her citizens from the operation of federal statutes' (id. at 447, 65 S. Ct. at 721). There are no such questions here. WUTC does not attack the constitutionality of the Communications Act on any ground; rather it relies upon the Federal statute, and seeks to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement." *Washington Utilities* at 1153.

In this case the majority below took a contrary view. First, the majority found that *parens patriae* standing for a state depended upon two factors, the injury alleged, and the identity of the defendant (36a). The lower court found that the first factor, the injury, alleged, was sufficient in and of itself for *parens patriae* standing in this case.[11]

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[11] The majority expressly conceded that a state's interest in freedom from "substantial disruption of [its] internal economy

However, Pennsylvania alleged injury at the hands of a federal defendant and that proved fatal in the D.C. Circuit.

The difference between the Ninth Circuit's approach in *Washington Utilities* and the majority's here, constitutes a dispute as to the interpretation and application of *Massachusetts v. Mellon*, 262 U.S. 447 (1923). The Ninth Circuit correctly found that *Mellon* did not bar *parens patriae* challenges to federal action "to assure compliance with 'the congressional will, by preventing . . . a violation of [federal law] by the administrative agency charged with its enforcement."[12] *Mellon*, on the other hand, dealt with a state's "challenge to the constitutional authority of the central government to enact a given statute," which, of course, was not Pennsylvania's aim in this action. Pennsylvania sought only to question whether or not the SBA's conduct violated the "Congressional will" as expressed in the Disaster Relief Act.

The court below, however, read *Mellon* to preclude this action by Pennsylvania because—and this was the second factor of its analysis—the defendant was the federal government (35a-42a). This alone precluded Pennsylvania's suit. It did not matter to the lower court that Pennsylvania was not challenging the constitutional au-

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and impairment of the well-being of [its] citizenry [was] sufficient interest for a state's *parens patriae* standing" (34a, see also 26a). Moreover, as mentioned above, the Court erroneously viewed the class of Pennsylvanians affected by the illegal federal conduct as being only those who would suffer from illegality in "the actual provision of aid to small business concerns." (27a) Even though the majority erroneously viewed the class of people injured to be so limited (see n. 3 supra), it still did not doubt the sufficiency of the injury alleged for *parens patriae* standing.

[12] Dissent, p. 50a, quoting *Washington Utilities*, at 1153.

thority for, or even the validity of, the Disaster Relief Act of 1970—nor that Pennsylvania was not questioning the power of the Federal government to administer disaster relief. And, it was not important to the court that Pennsylvania only sought to challenge the legality of certain SBA officials' conduct in the discharge of their statutory duties. These considerations were, of course, critical to the Ninth Circuit (50a).[13]

What was crucial to the majority below was the "identity of the defendant" (35a). So critical is this factor in the lower court's view that when the federal government is a defendant in this type of suit, notwithstanding any other factors suggesting that standing be allowed, the federal interest in avoiding ". . . state interference with the exercise of federal powers" (40a-41a) would be ". . . an overwhelming consideration, as would predominate even if the arguments in support of standing were more powerful than they are here" (46a).

The majority below did make a faint attempt to distinguish *Washington Utilities*. However the court explicitly refused to express ". . . any view as to the propriety of that decision . . ." (46a-47a). The Court noted, as dis-

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[13] These factors were also critical to Judge Lumbard:

"The majority also seeks to dismiss in a footnote the contention that there is a valid distinction between a state's challenge to the constitutional authority of the central government to enact a given statute and an attack upon the manner in which a concededly lawful statute is enforced and administered, [citation omitted]. For me, however, this distinction is pivotal. The former is clearly and obviously a fundamental threat to the federal sovereign power; the latter seeks only to vindicate the will of the people as it has been expressed by their duly elected representatives in the national legislature." (50a-51a).

tinguishing features, the specialized field involved in *Washington Utilities* as well as the "close interaction of state and federal regulations in the communications field". However, as Judge Lumbard noted ". . . the need for cooperation and coordination between state and federal governments is nowhere more obvious than in the administration of a massive disaster relief program (50a)." Thus, it is not surprising that Congress found, and explicity provided that the Act "provide an orderly and continuing means of assistance by the Federal Government to state and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disaster . . ." 42 U.S.C. §4401(b).[14] Surely then, this factor does not distinguish the cases.

The conflict in the decisions is obvious. The lower court has misread *Mellon* to preclude a state's *parens patriae* challenge to allegedly illegal federal activity, even in those situations where the state is not questioning the federal power to legislate or act in the area. The Ninth Circuit has correctly interpreted *Mellon* to allow such a suit. This is such a suit, and were it instituted in the Ninth Circuit it would have been permitted.

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[14] Examples of state law which directly key the state disaster relief effort to the SBA effort are found in the Act of May 11, 1973, P.L. 27, No. 13, and the Act of January 12, 1974, P.L. 445, No. 159. Act 13 was a direct grant program for homeowners who suffered flood damages, intended primarily to assist in the repayment of SBA disaster loans. Act 159 was a direct grant program for certain nonprofit organizations, also to assist in repaying disaster loans.

2. Standing of Pennsylvania as a Party Harmed

The lower court also found that Pennsylvania lacked standing to maintain this action in its own behalf. That result would also have differed had the *Washington Utilities* Court ruled on the matter.

The Ninth Circuit's reasoning in this respect is clear and precise. First, the Court concluded that FCC regulatory activity was judicially reviewable under the Administrative Procedure Act,[15] *Washington Utilities* at 1146. Next, the court characterized Washington's alleged injury:

> "WUTC's petition for review alleges that WUTC and the general public of Washington 'are aggrieved' by the FCC order because '[e]ffectuation of the Order would serve to increase the burden to intrastate telephone users by reason of the diversion of interstate usage of telephone network facilities to the detriment of telephone users whose rates are regulated by state authorities.'" Id. at 1146.

Except for the subject matter involved, that allegation does not differ in any relevant respect from Pennsylvania's allegation that the ". . . lesser 'B' classification by the respondents denied the plaintiff and those it represents . . . the requisite professional SBA personnel and administra-

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[15] In this case the lower court, and trial court for that matter, properly gave no consideration to the SBA's contention that its disaster relief activities were not subject to judicial review. See *Federal Communications Commission v. Schreiber*, 381 U.S. 279, 292 (1965); *Federal Radio Commission v. Nelson Brothers Bond Mortgage Co.*, 289 U.S. 266, 277 (1933); *Overseas Media Corp. v. McNamara*, 385 F.2d 308, 316 (D.C. Cir. 1967).

tive resources to effectively administer and deliver disaster recovery assistance in the Commonwealth of Pennsylvania" (7a).

Both courts then scrutinized their respective plaintiffs' standing by applying the two-pronged test articulated by this Court in *Association of Data Processing Service Organization, Inc. v. Camp,* 397 U.S. 150 (1970). By that standard a party must allege "that the challenged action has caused him injury in fact, economic or otherwise," and the interest he seeks to protect must fall "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing,* supra at 152-3. However, with indistinguishable legal and factual considerations at play, the Ninth Circuit correctly found standing for the State of Washington in that case, while here the lower court found that Pennsylvania lacked standing.

The Ninth Circuit looked to both federal and state law and determined that the State of Washington, through its utility commission, had a legal obligation "to protect the interest of Washington telephone users." *Washington Utilities* at 1149. Similarly, in this case, a reading of federal and state law, not to mention fundamental notions of governmental responsibility, clearly demonstrates that Pennsylvania has legal obligations in the area of disaster relief (see n. 14 supra and accompanying text). Thus, the lower court found that Pennsylvania had alleged a sufficient proprietary interest in the "impairment of its ability to look after the well-being of its citizens" (27a).[16]

[16] The lower court equivocated on this point, and may have even held that this portion of the test, "injury in fact" was not met by Pennsylvania (28a). If this is the correct reading of the opinion two points must be made. First, in view of the Congressional recognition of the States' duties in the area of disaster relief (See pp. 11-12 supra), and in view of the State law in this area, a finding of no injury-in-fact only heightens the conflict with the Ninth Circuit. Secondly, the court's view of the state's injury is of doubtful validity because it is clear that it completely misperceived, factually and legally, the broad disaster relief responsibilities imposed upon the SBA. See discussion at n. 3 supra.

This is where the similarity ends, and the conflict begins. The Ninth Circuit found that the interests the State of Washington advanced in reasonable telephone rates and quality service fell "arguably within the zone of interests to be protected by the statute." *Washington Utilities* at 1151. The court below, however, operating under an erroneous reading of the Disaster Relief Act and the Small Business Act, supra, found that Pennsylvania's interest did not come within that "zone". The error is the lower court's, for, as has already been noted, it completely misconstrued SBA's broad role in the area of disaster relief. The lower court mistakenly found that the Act provided only a limited role for the SBA in the overall disaster relief program. Having misperceived the statute, the majority necessarily construed the statute's "zone of interest to be protected", too narrowly.

There is a clear conflict between this decision and the decision of the Ninth Circuit in *Washington Utilities.* Where the Ninth Circuit would have found standing for Pennsylvania both as *parens patriae* and in its own behalf, the majority below would not. Moreover, this conflict is irreconcilable and should therefore be resolved by this Court.

B. THE DECISION OF THE LOWER COURT IS CONTRARY TO PRIOR DECISIONS OF THIS COURT

This Court has consistently held that injuries to a State's quasi-sovereign interests can be vindicated by suits *parens patriae*. Thus such suits have been allowed against: other States,[17] municipal subdivisions,[18] private corporations,[19] and even the federal government.[20]

In this case the lower court conceded that "injury to the state's economy or the health and welfare of its citizens, if sufficiently severe and generalized, [could] give rise to a quasi-sovereign interest in relief as [would] justify a representative action by the state" (34a). However, the court then decided that the existence of such an interest here was ". . . made irrelevant by the presence of a federal defendant . . ." (43a). That reasoning has no basis in the precedents of this Court.

The lower court relied exclusively upon this Court's ruling in *Massachusetts v. Mellon*, 262 U.S. 447 (1923) for its conclusion that when the legality of federal activity

[17] *New Jersey v. New York*, 283 U.S. 336 (1931); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Kansas v. Colorado*, 206 U.S. 46 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906); cf., *Illinois v. City of Milwaukee*, 406 U.S. 91, 97 (1972).

[18] *Illinois v. City of Milwaukee*, 406 U.S. 91, 99 (1972).

[19] *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945); *Georgia v. Tennessee Cooper Co.*, 206 U.S. 230 (1907); Cf., *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 256 n. 7 (1972); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 505 (1971).

[20] *Washington Utilities*, supra; *South Carolina v. Katzenback*, 383 U.S. 301 (1966); *New York v. United States*, 331 U.S. 284 (1947).

is questioned, factors ". . . quite apart from the injury . . ." will determine whether the state may proceed with its claim (35a). Viewed properly, *Mellon* is not authority for this proposition. As the Ninth Circuit recognized, *Mellon*, at most, held only that states could not sue *parens patriae* to challenge the authority of Congress to legislate on a particular matter or, question the power of the federal government to act in that field. *Mellon* at 482. As pointed out above, this clearly is not what Pennsylvania sought to do in this case. And this certainly is not an appropriate time for *extending* Mellon beyond the confines of its facts. *Massachsuetts v. Laird*, 400 U.S. 886 (1970) (Mr. Justice Douglas dissenting); Strausberg, G., *The Standing of A State as Parens Patriae to Sue the Federal Government*, 35 Fed. B. J. 1 (1976) (concluding that in *this* case the court should have found that Pennsylvania had *parens patriae* standing, and that *Mellon* was no obstacle to such a conclusion.)

Finally, if *Mellon* is somehow determined to be controlling under these facts its continued vitality must be reassessed. Federal-state relations have changed dramatically in the half century since *Mellon* was decided. For example, the federal agencies involved in the two conflicting circuit court cases, the FCC and the SBA, did not even exist in 1923 when *Mellon* was decided.[21] Moreover, the staggering presence of the Department of Health, Education and Welfare was still thirty years away.[22] And there was likewise no Social Security,[23] Medicaid, or Aid to Families with Dependent Children. Clearly the nature

[21] See 47 U.S.C. §151 (F.C.C.); 15 U.S.C. §631 (SBA). The F.C.C. was created in 1934, and the SBA was created in 1953.

[22] Reorganization Plan of 1953, 67 Stat. 18, 42 U.S.C. §3501.

[23] The Social Security Act, 49 Stat. 62, 42 U.S.C. §301.

of "Our Federalism"[24] has substantially changed since the relatively placid era in which *Mellon* was decided. Accordingly, it is no longer sound federalism to insulate one partner in this Union from challenges by the other. Today the Federal Government, in one way or another, has insinuated itself into substantially every State program or policy. That was not the case fifty years ago. Accordingly, the law of *parens patriae* standing, should be adjusted to reflect the present realities of federal-state relations.

VI. CONCLUSION

For the foregoing reasons petitioners respectfully request that this Court grant the petition for writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

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[24] *Younger v. Harris*, 401 U.S. 37, 44 (1971).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-9

Commonwealth of Pennsylvania, by Milton J. Shapp, its Governor; William H. Wilcox, its Secretary of Community Affairs; and Israel Packel, its Attorney General, and upon the relation of, Martha N. Specht, Alvin L. Wagner, Mary Domino, Harold S. Domino

vs.

Thomas S. Kleppe, as Administrator of the Small Business Administration

Russell Hamilton, as Director Policies and Procedures and as former Regional Director of Region 3 of the Small Business Administration

Einor Johnson, as Acting Regional Director of Region 3

James Higgins, as Disaster Coordinator for Region 3

Joseph Clark, as Deputy Regional Director of Region 3

Small Business Administration, an agency of the United States of America

RELEVANT DOCKET ENTRIES

1974

Jan. 3, Complaint, appearance.

Jan. 3, Summons, Copies (8) and Copies (8) of Complaint issued No. 1 serv. 1-7, Nos. 2 and 6 serv. 1-7-74

filed Nos. 3 & 4 Serv. 1-24-74 DA Serv. 1-4-74 Atty. Gen. 1-7-74 No. 5 N.F. 1-24-74.

Jan. 3, Motion of Plaintiff for leave to shorten time depositions may be taken pursuant to F.R.C.P. 30(b) (3); Affidavit; Exhibit A; P & A's.

Jan. 4, Motion of Plaintiff for leave to shorten the time depositions may be taken denied, FIAT (1-3-74) (N) Jones, J.

Jan. 15, Affidavit of Carl E. Grant; c/m 1-15-74.

Feb. 28, Notice by Plaintiff to take depositions of Defendants Nos. 2, 3, 4 and 5. c/s—

March 4, Appearance of George P. Stahl, Jr. as counsel for Defendant No. 2. (1518 Walnut Street, Philadelphia, Pa. 19102)

March 4, Motion of Defendants to dismiss or, in the alternative, for summary judgment; Affidavit; Exhibits A thru F; Statement; P & A's; Appendix; c/m 3-4-74; appearance of Thomas G. Corcoran, AUSA.

March 5, Motion of Defendants for a Protective Order; P & A; c/m 3-5-74.

March 20, Stipulation extending the time in which the Plaintiffs may respond to Defendants' motion for a protective order, to dismiss and for summary judgment to April 8, 1974, approved. (FIAT) (N) Jones, J.

April 5, Answer of Defendant No. 2 to complaint; c/m 4-5-74.

April 8, Points and Authorities by Plaintiffs in opposition to Defendants' motion to dismiss; c/m 4-5-74.

April 8, Points and Authorities by Plaintiffs in opposition to Defendants' motion for a Protective order; c/m 4-5-74.

April 8, Point and Authorities by Plaintiffs in opposition to Defendants' motion for a summary judgment; c/m 4-5-74.

April 18, Motion of Defendant for a protective order argued and granted. (Rep: Gloria Horning) Jones, J.

April 18, Order granting Defendants' motion for a Protective Order. (N) Jones, J.

April 29, Supplemental Memorandum by Plaintiffs in support of Plaintiff's Points and Authorities in opposition to Defendants' motion to dismiss; c/m 4-25-74.

May 9, Memorandum of Defendants in reply to Plaintiff's P and A in opposition to Defendants' motion to dismiss and Plaintiff's supplemental memorandum; c/m 5-9-74.

July 10, Motion of Defendants to strike answer of Russell Hamilton; P and A; Affidavit w/attachment; c/m 7-10-74.

July 26, Affidavit of Russell Hamilton; c/m 7-24-74.

August 9, Motion of Defendant to dismiss argued and granted. (OTBP) (Rep-G. Horning) Jones, J.

August 12, Order granting Defendants' motion to dismiss. (N) Jones, J.

September 5, Notice of appeal by Plaintiffs from the order entered August 12, 1974. Copy mailed to Thomas G. Corcoran; $5.00 paid and credited to U.S.

September 5, Deposit of $250.00 cash security by Plaintiff Commonwealth of Pennsylvania in lieu of cost bond on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing.]

COMPLAINT

PRELIMINARY STATEMENT

1. This is a civil action seeking equitable, mandatory, injunctive and other appropriate relief against Thomas S. Kleppe, Administrator of the Small Business Administration, certain named and unnamed subordinates, and the Small Business Administration. This action seeks to enjoin the defendants from continuing to act in an unlawful, unauthorized, arbitrary and capricious manner in their administration of disaster recovery efforts mandated after the devastation of Hurricane Agnes and the ensuing flood. This action seeks *inter alia* to compel the defendants Kleppe, his subordinates and the Small Business Administration from discontinuing flood recovery operations in the Commonwealth of Pennsylvania, and from refusing to remedy the continuing effects of the defendants' actionable conduct.

JURISDICTION

2. This action arises under and jurisdiction is invoked pursuant to 28 U.S.C. §§1331, 1361, 1337, 2201,

2202; 15 U.S.C. §634(b)(1) and 5 U.S.C. §552(3) and the laws and the Constitution of the United States. The amount in controversy exceeds $10,000 exclusive of interest and costs.

PARTIES

3. Plaintiff is the Commonwealth of Pennsylvania. This action is brought by Governor, Milton J. Shapp; its Secretary of Community Affairs, William H. Wilcox; and its Attorney General, Israel Packel:

a. on behalf of itself, as a party harmed by the unlawful, unauthorized, arbitrary and capricious actions of the defendants, Thomas S. Kleppe, his subordinates, and the Small Business Administration,

b. as *parens patriae* for all of Pennsylvania's citizens, taxpayers, and residents who are and have been harmed or damaged by the conduct of the defendants, and

c. upon the relation of Martha N. Specht, Alvin L. Wagner, Mary Domino and Harold S. Domino who were harmed by the conduct of the defendants.

4. Defendant, Thomas S. Kleppe is the Administrator of the Small Business Administration, and as such, was and is responsible for that agency's disaster recovery obligations resulting from the devastation caused by Hurricane Agnes.

5. Defendant, Russell Hamilton is the Director of Policies and Procedures, Small Business Administration, and at all times relevant to the grievances hereinafter set

forth was the Director of Region 3, Small Business Administration, and as such, he was responsible for S.B.A.'s disaster recovery operations resulting from the devastation caused by Hurricane Agnes within Region 3 of which the Commonwealth of Pennsylvania is a part.

6. Defendant, Einor Johnson is the Acting Director of Region 3, Small Business Administration and as such, is presently responsible for S.B.A.'s disaster recovery operations resulting from the devastation caused by Hurricane Agnes within Region 3.

7. Defendants James Higgins and Joseph Clark are respectfully Disaster Coordinator for Region 3 and Deputy Regional Director, Small Business Administration, and as such, have been and are responsible for the implementation of S.B.A.'s disaster recovery operations resulting from the devastation caused by Hurricane Agnes within Region 3.

8. Defendant Small Business Administration is an agency of the United States of America, created pursuant to 15 U.S.C. §631 *et seq.* and charged, *inter alia,* with responsibility and has authority to provide assistance and disaster relief to persons and entities in need and entitled to such relief as a result of disasters such as Hurricane Agnes.

FACTUAL ALLEGATIONS

9. From June 21, 1972, to June 25, 1972, there occurred the worst natural disaster in the history of the United States which was known as Hurricane Agnes.

10. As a result of this Hurricane and ensuing floods, the Commonwealth of Pennsylvania, and the citizens thereof suffered losses unparalleled in the history of the Commonwealth of Pennsylvania, and unparalleled by devastation in any other areas in the country.

11. Unknown to the plaintiff, officials, citizens, taxpayers, and residents of the Commonwealth of Pennsylvania, defendants had a secret, unpublished scheme of classifying disasters.

12. Unknown to the plaintiff, officials, citizens, taxpayers and residents of the Commonwealth of Pennsylvania, defendants utilizing the secret and unpublished scheme classified Agnes and Pennsylvania as a "B" disaster and "B" disaster area.

13. From what plaintiff now knows about this scheme, an "A" disaster receives top priority in the administration of disaster recovery operations as opposed to the substantially lesser priority afforded "B" rated disasters.

14. This lesser "B" classification by the defendants denied the plaintiff and those it represents, *inter alia,* the requisite professional S.B.A. personnel and administrative resources to effectively administer and deliver disaster recovery assistance in the Commonwealth of Pennsylvania.

15. The defendants did not publish regulations establishing this classification system, did not publish regulations indicating the criteria to be utilized in said classifications, did not publish the classification of Pennsylvania as a "B" disaster area, and did not afford the plaintiff and those it represents an opportunity to be heard on the classification which has drastically affected their lives and well being.

16. Defendants' classification of Pennsylvania as a "B" disaster area, or Hurricane Agnes as a "B" disaster

apparently was to promote the personal political aspirations of defendant Kleppe and was otherwise unlawful, unauthorized, arbitrary, and capricious and promulgated without any reasonable basis.

17. Defendants have classified, or treated, other disasters as "A" which were, comparatively, minor and of significantly less impact than Hurricane Agnes.

18. The defendants discriminatory classification and treatment of Pennsylvania in the face of the devastation of Hurricane Agnes in favor of much less severe disasters caused harm and injury to Pennsylvania's citizens suffering from the unparalleled devastation of Hurricane Agnes, was based on defendant Kleppe's personal and political motivation, and was directly contrary to the discharge of defendant Kleppe's legally imposed duties.

19. Defendants are presently dismantling the Small Business Administration flood relief operations in Pennsylvania created in response to Hurricane Agnes and have ordered that no further applications for assistance be accepted.

20. The actions of the defendants have caused severe injury to the plaintiff and those it represents, and unless immediately enjoined from the cessation of flood recovery assistance in Pennsylvania, plaintiff and those it represents will suffer irreparable injury.

21. Plaintiff has no adequate remedy at law.

CLAIMS UPON WHICH RELIEF IS SOUGHT

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22. The defendants were without authorization to designate either Pennsylvania or Hurricane Agnes with a

"B" rating under the Small Business Administration Act and the Federal Disaster Relief Act of 1970.

23. The declaration by the defendants and the designation of Pennsylvania or Hurricane Agnes with a "B" rating was in violation of the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*

24. The defendants actions in classifying Pennsylvania or Hurricane Agnes with a "B" rating was in violation of the Administrative Procedure Act, 5 U.S.C. §551 *et seq.* in that it was an adjudication without the provision of notice and an opportunity to be heard by the plaintiff and those it represents.

25. The defendants actions were without authority under the Administrative Procedure Act, the Small Business Administration Act, and the Federal Disaster Relief Act in that the classification of Pennsylvania or Hurricane Agnes with a "B' rating was done for personal political reasons and not pursuant and directly contrary to the discharge of defendant Kleppes legally imposed duties.

26. Defendants' classification herein complained of was unlawful, unauthorized, arbitrary and capricious, and as such was in violation of the Federal Disaster Relief Act and the Small Business Administration Act.

27. The actions of the defendants denied the plaintiff and those it represents due process of law as secured to them by the 5th and 14th Amendments to the United States Constitution in that plaintiff and those it represents was not given notice of the "B" classification given to Pennsylvania or Hurricane Agnes, nor was it given the opportunity to challenge this classification.

28. The actions of the defendants have denied those the plaintiff represents their consttitutional right to the equal protection under the law.

REQUEST FOR RELIEF

Wherefore, plaintiff requests that this Court:

(a) order that the defendants immediately cease dismantling Small Business Administrations' flood relief operations in Pennsylvania;

(b) order that all Small Business Administration files for the Pennsylvania region related to Hurricane Agnes and the ensuing flood be impounded by this Court;

(c) order that Small Business Administration reopen the disaster relief loan program in Pennsylvania and review all applications and files including but not limited to those request for loans that were denied, which were late, which were for supplemental funds and which were incomplete, and to reconsider and approve applications under the standards prescribed by the Federal Disaster Relief legislation and regulations thereunder disregarding previous time limitations; (d) order that the reopening of the loan program in Pennsylvania be adequately publicized by the Small Business Administration within the Commonwealth of Pennsylvania and that sufficient Small Business Administration officers and professional personnel be allocated to accommodate the flood recovery needs of those the plaintiff represents.

(e) appoint a master, recommended and approved by the plaintiff to take custody of the impounded materials, and that this master and his designees review and approve all actions taken by the defendants pursuant to the Orders of this Court; and

(f) order such other equitable relief as the Court may deem necessary.

(s) Norman J. Watkins
Norman J. Watkins
Deputy Attorney General
Lawrence Silver
Deputy Attorney General
Chief, Litigation Division
Israel Packel
Attorney General

Department of Justice
Capitol Annex
Harrisburg, Pennsylvania 17120
(717) 787-3748

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing.]

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants, Thomas S. Kleppe, Administrator of the Small Business Administration, Einor Johnson, Acting Regional Director of SBA in Pennsylvania, James Higgins, SBA Disaster Coordinator for Region 3 in Pennsylvania, Joseph Clark, SBA Deputy Regional Director of Region 3 in Pennsylvania, and the Small Business Administration, by their undersigned attorneys, hereby move pursuant to Rule 12(b), Federal Rules of Civil Procedure, to dismiss this action on the grounds that the Court lacks jurisdiction over the subject matter of this action, and the complaint fails to state a claim upon which relief can be granted. In the alternative, defendants move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and the defendants are entitled to judgment as a matter of law.

In support of this Motion the Court is respectfully referred to the affidavit of Stephen H. Bedwell, Special Assistant to the Associate Administrator for Operations of the Small Business Administration, with Exhibits A

through F attached hereto, and to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,
Irving Jaffe
Acting Assistant Attorney General
Earl J. Silbert
United States Attorney
Harland F. Leathers
Thomas G. Corcoran, Jr.
Assistant United States Attorney
Gary I. Strausberg
Attorneys, Department of Justice
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing.]

ANSWER

PRELIMINARY STATEMENT

1. Admitted.

JURISDICTION

2. Admitted.

PARTIES

3. Admitted.

4. Admitted.

5. Admitted with the proviso that Russell Hamilton as Director of Region 3 Small Business Administration was accountable to the National Office in Washington, D.C.

6. Denied as stated. It is alleged and averred that Einor Johnson is no longer Acting Director of Region 3 and that some other person, unknown to the Defendant, Russell Hamilton, is now in charge of Region 3.

7. Denied as stated. It is alleged and averred that Messrs. Higgins and Clark are no longer responsible as Disaster coordinator for Region 3 and Deputy Regional Director, respectively for the Small Business Administration. They have been replaced by persons unknown to the Defendant, Russell Hamilton.

8. Admitted.

9. Admitted.

10. Admitted.

11. It is denied that the scheme of classifying disasters was a secret or unpublished scheme. On the contrary, it is averred that this was published.

12. It is admitted that the aforementioned disaster "Agnes" was classified a "B" disaster. It is denied that it was secret and unpublished.

13. Admitted.

14. Admitted.

15. The Defendant, Russell Hamilton, is without sufficient knowledge and/or information to form an opinion as to the conclusions or facts alleged herein and demands strict proof at the trial thereof.

16. Admitted.

17. Admitted.

18. Admitted.

19. Admitted.

20. Admitted.

21. Admitted.

22. The averments contained in this paragraph is a conclusion of law and does not require an answer by the Defendant, Russell Hamilton.

23. The averments contained in this paragraph is a conclusion of law and does not require an answer by the Defendant, Russell Hamilton.

24. The averments contained in this paragraph is a conclusion of law and does not require an answer by the Defendant Russell Hamilton.

25. The averments contained in this paragraph is a conclusion of law and does not require an answer by Defendant, Russell Hamilton.

26. The averments contained in this paragraph is a conclusion of law and does not require an answer by Defendant, Russell Hamilton.

27. Defendant, Russell Hamilton, is without sufficient knowledge and/or information to form an opinion as to the averments in this paragraph and demands strict proof at the trial thereof.

28. Defendant, Russell Hamilton, is without sufficient knowledge and/or information to form an opinion as to the averments in this paragraph and demands strict proof at the trial thereof.

Commonwealth of Pennsylvania,
County of Philadelphia, ss:

I, Russell Hamilton, being duly sworn according to law, do hereby state and depose that the facts contained in the foregoing Answer are true and correct to the best of my knowledge, information and belief.

(s) Russell Hamilton
Russell Hamilton

[Jurat omitted.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing.]

AFFIDAVIT OF RUSSELL HAMILTON

---

1. I am Russell Hamilton, and my address is 641 Hendren Street, Philadelphia, Pennsylvania.

2. I was a career employee with the Small Business Administration from May 15, 1965 until February 15, 1974.

3. I was Regional Director of Region III from August 19, 1970, until November 15, 1973.

4. The Commonwealth of Pennsylvania is totally within the geographical boundaries of Region III.

5. As Director of Region III my ultimate superior within the Small Business Administration was Thomas S. Kleppe, the Administrator of the Small Business Administration, who was and is responsible for the agency's disaster recovery efforts.

6. The Small Business Administration is an agency of the United States of America, with responsibility and authority to provide assistance and disaster relief to persons and entities in need and entitled to such relief as a result of disasters such as Hurricane Agnes.

7. From June 21, 1972 to June 25, 1972, while I was Director of Region III there occurred the worst natural disaster in the history of the United States known as Hurricane Agnes.

8. As a result of this hurricane and the ensuing floods the Commonwealth of Pennsylvania, and the citizens thereof, suffered losses unparalleled by devastation in any other areas in the country.

9. Over my protest the Administrator of the Small Business Administration, Thomas S. Kleppe classified Hurricane Agnes as a "B" disaster, and the Commonwealth of Pennsylvania as a "B" disaster area.

10. Hurricane Agnes in my opinion required an "A" disaster rating inasmuch as an "A" rating receives priority in the administration of disaster recovery operations as opposed to the substantially lesser priority afforded "B" rated disasters. In my opinion, the classification afforded Hurricane Agnes placed the entire responsibility with Region III, limiting my ability to obtain assistance from professional loan officers. Had this been a class "A" disaster, the responsibility would have rested with the National Office, whose powers to bring into Region III professional SBA loan officers were virtually unlimited. This had an adverse effect on the business loans as well as the larger home loans to the citizens.

11. The classification of Hurricane Agnes as a "B" disaster by the Administrator, Thomas S. Kleppe, was arbitrary and capricious. This classification was effectuated over my continued protests lodged with the National Chief of Operations, Claude Alexander. Mr. Kleppe never made an attempt to confer with me or return any of my phone calls to me related to Hurricane Agnes.

12. In my experience with the Small Business Administration I know of, and have participated in disaster recovery efforts in, other disasters which have been classified as "A" which were, comparatively, minor and of significantly less impact than Hurricane Agnes in Pennsylvania.

13. As of my departure from the Small Business Administration disaster recovery operations and facilities within the Commonwealth of Pennsylvania that were created in response to Hurricane Agnes were reduced to two offices and as of January, 1973, no further applications for disaster assistance from Pennsylvania citizens were being accepted in spite of the fact that there was a continuing need.

14. Due to the actions of Thomas S. Kleppe, in the discriminatory treatment afforded the Commonwealth of Pennsylvania in recovery from Hurricane Agnes, it was impossible for me as Director of Region III to provide adequate flood recovery assistance for all forms of business in need of recovery assistance. The reason for this in my opinion was due to the limitation on the number of professional SBA loan officers and to the administration resources.

(s) Russell Hamilton
Russell Hamilton

[Jurat and certificate of service omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 74-9

Commonwealth of Pennsylvania, et al.,
Plaintiffs

v.

Thomas S. Kleppe, et al.,
Defendants

ORDER

This matter having come before the court on Defendants' Motion To Dismiss, and the court having considered same, and being fully advised in the premises, it is this 12th day of August 1974

ORDERED:

That Defendants' Motion To Dismiss be and hereby is granted for lack of standing.

(s) Wm. B. Jones
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing.]

NOTICE OF APPEAL

Notice is hereby given that the above named Plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from the final order entered in this action dated August 12, 1974. Plaintiffs appeal from the Order issued by United States District Judge William Jones granting Defendants' Motion To Dismiss for lack of standing.

(s) Norman J. Watkins
Norman J. Watkins
Deputy Attorney General
Lawrence Silver
Deputy Attorney General
Chief, Litigation Division
Israel Packel
Attorney General

Dated: August 23, 1974

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1960

Commonwealth of Pennsylvania, by Milton J. Shapp, its Governor, et al.,

Appellants

v.

Thomas S. Kleppe, as Administrator of the Small Business Administration, et al.

Appeal from the United States District Court for the District of Columbia
(D.C. Civil Action 74-9)

Argued 30 October 1975

Decided 4 March 1976

Norman J. Watkins, Deputy Attorney General, with whom *Israel Packel*, Attorney General and *Lawrence Silver*, Deputy Attorney General, were on the brief for appellants.

Mary Elizabeth Medaglia, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry* and *Thomas G. Corcoran, Jr.*, Assistant United States Attorney, were on the brief for appellees.

Before: Lumbard,* *Senior Circuit Judge for the Second Circuit* and Tamm, Wilkey, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* Wilkey.

Dissenting opinion filed by *Senior Circuit Judge* Lumbard.

Wilkey, *Circuit Judge*: In late June of 1972 the mid-Atlantic coastal region was battered by the winds and inundated by the rains of Hurricane Agnes. The states of Pennsylvania, Maryland, and Virginia were designated major disaster areas[1] and thereby became eligible for special assistance from the Small Business Administration.[2] On 27 June 1972 the SBA announced that disaster relief would be made available to the devastated areas, and for administrative purposes[3] classified the three affected states as Class B disaster areas.

Dissatisfied with the program of relief offered by the SBA, and in part to enjoin discontinuance of the relief

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* Sitting by designation pursuant to 28 U.S.C. §294(d).

[1] Pursuant to the provisions of 42 U.S.C. §4402(1) (1970), of the Disaster Relief Act of 1970.

[2] Pursuant to the provisions of 15 U.S.C. §636(b) and 42 U.S.C. §4451 (1970).

[3] There is controversy in the record as to the precise effects of a Class B as opposed to a Class A disaster classification. There is general agreement that it resulted in relief administered from a regional rather than a national headquarters. There is disagreement, however, whether this classification bespeaks a lower priority in the allocation of SBA resources, and resulted in less total assistance than would have been received under the Class A designation. *Brief of Petitioner* at 3-4; *Brief of Respondent* at 3. *See* note 60 *infra*.

effort, the State of Pennsylvania[4] brought the present action in the District Court in early 1974. The complaint alleged that the state had standing to sue (1) on its own behalf, (2) as *parens patriae* for all its citizens allegedly injured, and (3) as *parens patriae* upon the relation of four named individuals. Respondent filed a motion to dismiss which, after oral argument, was granted by Chief Judge Jones, on the ground that plaintiff lacked standing to sue. Petitioner appeals from the written order of 12 August 1974 dismissing the suit.[5]

In presenting the problem of state standing, this case, beckons us into one of the least well-illuminated corners of a legal area of which it has been said that "generalizations . . . are largely worthless as such,"[6] and outcomes are "more or less determined by the specific circumstances."[7] Of standing doctrine in general, little can be said with certainty except that recent years have seen an expansion of the classes of persons eligible to bring suit.[8] The question of state standing embodies the basic standing question "of the nature and sufficiency of the litigant's concern with the

[4] The named officials bringing the action on behalf of the state were the Governor, the Secretary of Community Affairs, and the Attorney General.

[5] *Appendix* at 44a.

[6] *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970).

[7] *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953).

[8] *See, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1972); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968); *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968).

subject matter of the litigation,"[9] but is further confused by a variety of issues contingent upon the capacity in which the state brings suit and the parties against whom it is brought. The relatively few recent Supreme Court opinions discussing the issue of state standing to sue[10] are of some help in ameliorating the resulting uncertainty. However, to a great extent we are left to make our way by the light of opinions written decades ago, whose continuing authority is at least colored by the recent trend toward liberalized standing.

At the outset, we can say with certainty that petitioners have set forth two theories of standing which, in some contexts, will support prosecution of an action by a state. First, they have asserted that the state itself is a party injured by wrongful acts of the respondent. It is well settled that a state, like any institution, may sue for legal injuries to its *proprietary* interests.[11] Second, in bringing the action also on behalf of all injured citizens of the state, and upon the relation of four named individuals, Pennsylvania invokes a *parens patriae* theory of standing. At least in some instances a state may thus sue to vindicate the interests of its citizens.[12] We now turn to a consideration of whether

[9] *H. Hart & H. Wechsler, The Federal Courts and The Federal System*, 174 (1953).

[10] *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-60 (1972); *Massachusetts v. Laird*, 400 U.S. 886, 887-91 (1970) (Douglas, J. dissenting from denial of certiorari); *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966).

[11] *See, e.g., Maryland v. Wirtz*, 392 U.S. 183 (1968); *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 137-38 (1947).

[12] *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-60 (1972); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 445-46 (1945).

the circumstances of this case are such as will support action by the state on either theory.

I. *Proprietary Interest Basis for Standing*

The disaster loan program whose operation is the subject of the suit is limited to direct loans for the assistance of small business concerns.[13] Thus there could be, and is, no allegation that aid was illegally denied, either to the state or to some program administered by it. Rather petitioners appear to assert that the state suffered harm by injury to the economy, health, safety, and welfare of its people, by impairment of its ability to look after the well-being of its citizens, and by reduction of state tax revenues.[14]

The alleged injuries to the state's economy and the health, safety, and welfare of its people clearly implicate the *parens patriae* rather than the proprietary interest of the state. They involve no harm to the state beyond the individualized harms to her citizens, and thus if relief is to be granted it must be on the theory of the state as representative of those private interests.[15]

[13] 15 U.S.C. §636(b); 42 U.S.C. §4451 (1970).

[14] Petitioners' allegations of proprietary injury are sketchy and uncertain. The complaint does not go beyond the unexpanded statement that Pennsylvania was injured. Petitioners' brief alleges further that the proprietary injury was "to the state's ability to discharge its duties and responsibilities toward its citizens." *Brief of Petitioner* at 6. At oral argument the additional point was raised that state tax revenues were reduced due to the inadequacy of the SBA loan funds.

[15] *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-59 (1972); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 445-57 (1945).

The allegations as to the state's duty to look after the well-being of its citizens, and the reduction of its tax revenues, come closer to stating a legitimate interest in the state itself. The alleged injuries are not directly attributable to individual citizens of the state, and insofar as they are cognizable by the court, appear to involve the interests of the state as an independent entity. However, invoking the test of *Data Processing Service v. Camp,*[16] we conclude that the alleged injuries do not satisfy the requirement of being arguably within the zone of interests protected by the Small Business Act.

The Small Business Act,[17] under whose authorization the controverted activities were carried on, was enacted for the narrow purpose of assisting small business in a number of ways. The Act itself expresses no broader purpose than the actual provision of aid to small business concerns, except to recognize that such small concerns are essential to the preservation of a freely competitive economy.[18] The substantive sections of the Act provide for various forms of assistance running directly from the SBA to the business concerns themselves. Unlike many federal assistance programs,[19] no aid is authorized to be channelled through state agencies or coordinated with state programs. Nor do we find anything in the legislative history of the Act[20] to indicate any concern for the well-being of the states as distinct political units.

[16] 397 U.S. 150, 156 (1970).

[17] 15 U.S.C. §§631-51 (1970).

[18] 15 U.S.C. §631 (1970).

[19] *See, e.g.*, 7 U.S.C. §1926 (1970) (authorizing Secretary of Agriculture to grant or insure loans, for soil and water conservation purposes, to "public and quasi-public agencies").

[20] *See* H.R. Rep. No. 555, 85th Cong., 1st Sess. (1957); S. Rep. 1714, 85th Cong., 2d Sess. (1958); Conf. Rep. 2135, 85th Cong., 2d Sess. (1958).

We also find it highly questionable that petitioners have made sufficient allegation of injury in fact. While it is clear that cognizable injuries need not be economic in nature,[21] we have great difficulty conceptualizing in any coherent way the asserted injury to the state per se through the alleged impairment of its ability to fulfill duties owed to its citizens. One might draw from petitioner's language an implication of injury to the state's reputation for fulfilling its moral undertaking to care for its citizens. However, even if this type of injury to reputation is substantial enough under the liberal *Data Processing* standard, which we doubt, it is doubtful that the injury could be said to be caused by the alleged wrongful acts. If the state did, in some sense, commit itself to maintain a certain level of security against the consequences of natural disasters, any injury to its reputation for failure to meet that commitment would appear to proximately result from the action or inaction of the state itself. This appears necessarily to be true, at least in cases like the present one where there is no assertion of active disruption of state relief efforts.

The allegation that tax revenues were reduced embodies a comprehensible harm to the economic interests of the state government. However, it appears to us likely that this is the sort of generalized grievance about the conduct of government, so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing.[22] The parallel to the cases imposing very strict limits on taxpayer standing is imperfect, since it can not be

[21] *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

[22] *See Warth v. Seldin*, 422 U.S. 490, 498-502 (1975); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 217 (1974); *United States v. Richardson*, 418 U.S. 166, 176-77 (1974); *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

said of the state that its economic interest is no different than those of many others. Still, the unavoidable economic repercussions of virtually all federal policies, and the nature of the federal union as embodying a division of national and state powers, suggest to us that impairment of state tax revenues should not, in general, be recognized as sufficient injury in fact to support state standing. By analogy to the taxpayer standing cases, it seems appropriate to require some fairly direct link between the state's status as a collector and recipient of revenues and the legislative or administrative action being challenged. This would prevent state standing in cases like the present one, where diminution of tax receipts is largely an incidental result of the challenged action.[23]

We therefore conclude that neither the impairment of the state's ability to look after its citizens nor the diminution of its tax revenues constitutes sufficient injury to state proprietary interests to confer standing.

II. *Parens Patriae Basis for Standing*

The standing of states to bring *parens patriae* actions on behalf of their citizens has undergone substantial expansion beyond the traditional common law representation of "persons under a legal disability to act for themselves."[24] In particular circumstances, courts have relied on *parens patriae* reasoning to uphold state representation of a variety of interests, in actions against other states,[25] against private

[23] *See Flast v. Cohen*, 392 U.S. 83, 103 (1968).

[24] *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972).

[25] *See, e.g., Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

entities,[26] and, in a few instances, against agencies of the Federal Government.[27]

However, there are also a significant number of cases in which states have been refused the right to serve in such a representative capacity, and the reasons for the divergent holdings are not always readily apparent. Because of the variety of policy concerns which may be implicated depending upon the factual context of the action, no monolithic principle of *parens patriae* standing can be formulated. Any answer to the question whether a state may sue on behalf of its citizens must be qualified by statement of the type and extent of the interests to be represented, and of the defendants against whom the action is brought.

A. *Interests Which a State May Represent*

The nature of the interest which a state seeks to represent is the most readily apparent element governing *parens patriae* standing. While one can not conclusively determine that the requisites of standing are present from this factor alone, the cases make clear that some interests are an inadequate basis for standing under all circumstances.

Leaving aside the long recognized power of the state to represent the legally incompetent and the unknown,[28]

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[26] *See, e.g., Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 445-46 (1945); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

[27] *See, e.g., Washington Util. & Transp. Comm. v. FCC*, 513 F.2d 1142 (9th Cir., *cert. denied*, 96 S.Ct. 62 (1975); *New York v. United States*, 65 F. Supp. 856, 872 (N.D.N.Y. 1946), *aff'd*, 331 U.S. 284 (1947) (affirmed without discussion of standing issue).

[28] *See Mormon Church v. United States*, 136 U.S. 1, 58 (1890).

it appears that states suing *parens patriae* are limited to causes in which the state itself can be said to have a quasi-sovereign interest.[29] The essential characteristics of this quasi-sovereign interest are not explicitly set out in the case law. Further, it appears that the meaning of the term may have undergone some expansion over time.

The earliest cases[30] allowing a state to sue as representative of its citizenry involved the protection or preservation of land or other natural resources. The state's concern did not arise from a direct property interest of its own, but from its sovereignty over all territory within its boundaries. While the state thus lacked standing to sue in its own right, it was found to be a proper party to bring suit because of its residual "interest independent of and behind the titles of its citizens, in all the earth and air within its domain."[31] On this theory of quasi-sovereignty, state actions were allowed contesting diversion of interstate waters[32] and various types of interstate pollution.[33]

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[29] *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258-59 (1972); Note, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 Colum. *J.L. & S. Prob.* 411, 431 (1970).

[30] State standing on an explicit *parens patriae* theory was first upheld by the Supreme Court in *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). The theory had been considered a year earlier in *Louisiana v. Texas*, 176 U.S. 1, 19 (1900), where the unique facts of the case led the Court to a conclusion of no standing.

[31] *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

[32] *New Jersey v. New York*, 283 U.S. 336 (1931) (standing not discussed); *North Dakota v. Minnesota*, 263 U.S. 365, 373-74 (1923); *Wyoming v. Colorado*, 259 U.S. 419, 464 (1922); *Kansas v. Colorado*, 206 U.S. 46, 99-100 (1907).

[33] *New York v. New Jersey*, 256 U.S. 296, 301-02 (1921); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *Mis-*

Although the reference to state sovereignty suggests an essential territorial or natural resource dimension in the interest to be represented, it soon became clear that *parens patriae* standing might exist absent any connection with the state's sovereign power over the land. Not long after *parens patriae* standing was allowed in the water and pollution contexts, the Supreme Court recognized that states also have an underlying interest in the continuing prosperity of their economies. It upheld state standing to challenge actions whose clear and direct effects would be the substantial disruption of the state's internal economy and impairment of the well-being of the citizenry.[34] While the Court did not state at that time whether this concern for the general welfare is within the previously recognized category of quasi-sovereign interests, it has subsequently made clear that it is, most recently in the case of *Hawaii v. Standard Oil Company*.[35]

The nature of the economic or welfare interest necessary to justify state standing is one of the more obscure issues with which we must deal. The valid though largely unhelpful generality which guides us is that the controversy must in substance implicate the state's interest in economic supervision, and not merely affect the fortunes of a limited class of her citizens.[36] However, in view of the substantial

souri v. Illinois, 200 U.S. 496 (1906) (standing not discussed); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

[34] *Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923).

[35] 405 U.S. 251, 257-59 (1972). *See Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 447-48 (1945); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 393-94 (1938).

[36] *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 451 (1945) (requiring "an interest apart from that of particular individuals who may be affected"). *See Oklahoma ex rel. Johnson v. Cook*,

interrelationship of all economic activity, no clear demarcation is possible between individualized harms and injury to the economy as a whole. This appears to be one area where the sufficiency of the injury actually alleged is highly contingent upon other relevant factors bearing on the appropriateness of letting the plaintiff state pursue the case on the merits.

At one extreme, it is entirely clear that a state never has standing on the basis of personal claims assigned to it by individuals.[37] It also seems well established that there can be no standing in the state where the primary thrust of an alleged wrong is injury to a narrowly limited class of individuals, and the harm to the economy as a whole is insignificant by comparison.[38] However, in some cases, it has been held sufficient that the direct impact of the alleged wrong be felt by a substantial majority, though less

304 U.S. 387, 394 (1938); *North Dakota v. Minnesota*, 263 U.S. 365, 376 (1923); *Oklahoma v. Atchison T. & S.F. Ry.*, 220 U.S. 277, 289 (1911); *Louisiana v. Texas*, 176 U.S. 1, 16 (1900); *New Hampshire v. Louisiana*, 108 U.S. 76, 90-91 (1883).

The above cases do not present an isolated question of whether a state has standing to protect an interest in economic well-being. All were brought within the original jurisdiction of the Supreme Court, and thus involve the concern to shepherd the scarce time and resources of that tribunal. Those actions brought against states also raise important federalism issues. *See* Part II, B *infra*.

[37] *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395-96 (1938) (contract action); *North Dakota v. Minnesota*, 263 U.S. 365, 375-76 (1923) (tort action); *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (contract action).

[38] *Oklahoma v. Atchison, T. & S.F. Ry. Co.*, 220 U.S. 277, 289 (1911) (no standing to seek injunction of unreasonable freight rates). *See Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 451-52 (1945) (finding state standing, but explicitly affirming *Oklahoma v. Atchison, T. & S.F. Ry. Co.*).

than all, of the state's citizens, so that the suit can be said to be for the benefit of the public.[39] And even where the most direct injury is to a fairly narrow class of persons, there is precedent for finding state standing on the basis of substantial generalized economic effects.[40]

It thus appears that injury to the state's economy or the health and welfare of its citizens, if sufficiently severe and generalized, can give rise to a quasi-sovereign interest in relief as will justify a representative action by the state. The cases indicate not only that the nature and degree of essential harm can not be characterized with any precision,[41] but that factors other than the degree of injury are influential in determining state standing. One of these which is in great measure dependent upon the nature of the injury alleged, is the presence or absence of a more appropriate party or parties capable of bringing the suit.[42] However, it also appears that the sufficiency of

[39] *Pennsylvania v. West Virginia*, 262 U.S. 553, 564-65 (1923).

[40] *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258-59 (1972) (suggesting the existence of *parens patriae* standing to sue for damages under the antitrust laws, but finding no legal injury to the state under the statute); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450-51 (1945) (finding *parens patriae* standing to seek injunction against discriminatory freight rates, though shippers are the class of persons most immediately injured).

[41] It has been further suggested that the Court itself has not been consistent in its declaration of the nature of the requisite injury. *See* Comment, *Standing of States to Represent the Interests of their Citizens in Federal Court*, 21 *Am. L. Rev.* 224, 235 (1971); *Note, Federal Jurisdiction—Suits by a State as Parens Patriae*, 48 *N.C. L. Rev.* 963, 968-69 (1970).

[42] *Parens patriae* standing appears to be most justifiable in those instances where undeniable harm has been done, but for some reason the individual injuries are not legally recognizable. One instance of this arises in the case of interstate public nuisances. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). The arguments in favor of allowing such standing become less compelling, as it becomes more feasible to achieve complete relief through suits by the parties actually aggrieved.

Wherever private actions for damages are a possibility, the threat of double recovery stands as a major obstacle to any state action for damages. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-64 (1972).

[43] But note that the policies impinging on the determination of standing will vary depending on the citizenship of the private defendant. Where a state seeks to sue a citizen of another state, the action comes within the original though non-exclusive jurisdiction of the Supreme Court. 28 U.S.C. §1251(b)(3) (1970). In general, the fact that any case appears to fall within the original jurisdiction of the Supreme Court may incline the Court toward a finding of no standing, in order to conserve its scarce time and resources. While the Court has significant discretion to decline to hear cases falling within its original jurisdiction, *see Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), it may nonetheless wish to dismiss on the basis that standing is absent.

the state interest asserted may sometimes be influenced by policy concerns arising from the context of the suit quite apart from the injury itself. The most important of such considerations are defendant against whom the action is brought.

B. *Identity of Defendant Parties as a Factor Determining Parens Patriae Standing*

In actions against private entities, the question of state standing largely reduces to an analysis of the injury suffered, and the attendant factors set out above. The private nature of the defendant does not, of itself, import any substantial considerations, either pro or con, affecting the question of state standing.[43] However, when a state

seeks to sue either another state, or some branch of the federal government, significant policy concerns, apart from the injury itself, become relevant in determining the state's fitness to bring suit. For the most part, these concerns involve the proper allocation of authorities within the federal system.

A substantial proportion of the cases in which *parens patriae* standing has been allowed have been actions between two states.[44] That this is so may be partly attributable to the Supreme Court's longstanding recognition[45] of its constitutional duty to resolve interstate controversies which, before the Constitution, were settled by diplomacy and negotiation.[46] "Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy . . . ."[47] The opportunity to act as such an arbiter of interstate disagreements arises from the Supreme Court's original jurisdiction

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This consideration does not arise where a state seeks to sue its own citizen, since there is then no question of original jurisdiction.

[44] *E.g., New Jersey v. New York,* 283 U.S. 336 (1931); *North Dakota v. Minnesota,* 263 U.S. 365 (1923); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923); *Wyoming v. Colorado,* 259 U.S. 419 (1922); *New York v. New Jersey,* 256 U.S. 296 (1921); *Kansas v. Colorado,* 206 U.S. 46 (1907); *Missouri v. Illinois,* 200 U.S. 496 (1906); *Missouri v. Illinois,* 180 U.S. 208 (1901).

[45] *See Rhode Island v. Massachusetts,* 37 U.S. (12 Pet.) 657, 743 (1838).

[46] *North Dakota v. Minnesota,* 263 U.S. 365, 373 (1923); *Kansas v. Colorado,* 206 U.S. 46, 84 (1907); *Missouri v. Illinois,* 180 U.S. 208, 241 (1901).

[47] *Missouri v. Illinois,* 180 U.S. 208, 241 (1901).

over controversies between states.[48] The duty to so act arises from the exclusivity of that jurisdiction,[49] and the absence of adequate alternative avenues of redress.

Therefore, the presence of a state defendant provides added impetus to recognize standing to sue wherever the interests of the state are substantially implicated—that is wherever standing is already reasonably clear.[50] In reasoning from the precedents of interstate cases which have upheld standing, it is important to keep in mind that an action involving other than a state defendant does not raise any such concern for the resolution of interstate disputes. Therefore if other circumstances of the action suggest important arguments for denying state standing, analysis may indicate that standing should be denied, even if the interest to be represented seems superficially similar to that held an adequate basis for standing in an interstate suit.

In some cases like the present one, *where the defendant is not a state but some agency of the Federal Government, such important arguments for denying state standing do exist.* The individual's dual citizenship in both state and nation, with separate rights and obligations arising from each, suggests that both units of government act as *parens patriae* within their separate spheres of activity. The general supremacy of federal law gives some reason

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[48] U.S. Const. art. III, §2.

[49] 28 U.S.C. §1251(a)(1) (1970).

[50] At the same time, under the Eleventh Amendment, the fact that the action is brought against a state gives added support to a holding of no standing where such standing already appears highly doubtful—that is where the interests involved are essentially those of particular injured persons. *See North Dakota v. Minnesota,* 263 U.S. 365, 375-76 (1923).

to conclude that the federal *parens patriae* power should not, as a rule, be subject to the intervention of states seeking to represent the same interest of the same citizens. In the terms used by the *parens patriae* cases, the state can not have a quasi-sovereign interest because the matter falls within the sovereignty of the Federal Government.

The Supreme Court has repeatedly recognized (as a factor governing state standing) this interest of the Federal Government in the exclusivity of its *parens patriae* powers. The first and still dominant case in the field is *Massachusetts v. Mellon*,[51] where the state sought to sue on behalf of its citizens to enjoin enforcement of an allegedly unconstitutional act of Congress. While it is debatable whether the Court in that case meant to bar all state *parens patriae* suits against the Federal Government, the opinion makes clear at least that the federal interest will generally predominate and bar any such action.[52] The substantial importance of this federalism interest has been repeatedly recognized, both in opinions which offered it as the pri-

[51] 262 U.S. 447 (1923).

[52] The Court begins its discussion with the statement that "[w]e need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress . . . ." 262 U.S. at 485. However, a few sentences later it asserts that, while a state may sometimes sue on behalf of its citizens, "it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government." *Id.* at 485-86. This latter statement sounds like a flat denial of state *parens patriae* power in areas where federal power exists, and thus would bar any such suit against the Federal Government. *See also* dictum in *Georgia v. Pennsylvania R.R.*, note 54 *infra*. We see no need to resolve this apparent ambiguity in the opinion, and will base our analysis on the narrower reading of the *Mellon* case.

mary grounds for denying standing,[53] and in at least one case where standing was allowed, with the Court hastening to point out that no federal defendant was involved.[54] It is true that a few cases have allowed suits by states or their agencies, acting *parens patriae*, against the Federal Government. However, none of these cases should be viewed as a general rejection of the concern for exclusive allocation of federal *parens patriae* functions.[55]

[53] *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); *Jones ex rel. Louisiana v. Bowles*, 322 U.S. 707 (1944) (motion for leave to file complaint denied for lack of jurisdiction); *Florida v. Mellon*, 273 U.S. 12, 18 (1927); *Minnesota ex rel. Lord v. Benson*, 107 U.S. App. D.C. 106, 108, 274 F.2d 764, 766 (1960).

[54] *Georgia v. Pennsylvania R.R.*, 327 U.S. 439, 445-46 (1945). ("... *Massachusetts v. Mellon and Florida v. Mellon, supra*, make plain that the United States, not the State, represent the citizens as *parens patriae* in their relations to the federal government.").

[55] In the only case in which the Supreme Court has upheld state *parens patriae* standing to sue the Federal Government, the opinion of the Court did not discuss the standing question. The court proceeded directly to the merits and ruled against the plaintiff states. *New York v. United States*, 331 U.S. 284 (1947). It is also noteworthy that the case involved a regional shifting of the ICC freight rate burden by reciprocal tariff increases and decreases, and that the Attorneys General of numerous states were represented on appeal to the Supreme Court, on both sides of the case. Thus, while the case was brought to challenge the action of a federal agency, it was, as a matter of interest, also a controversy between states, implicating the interest in settlement of interstate disputes. *Id.* at 288-289.

An argument for granting state *parens patriae* standing to challenge the Vietnam War was made by Justice Douglas in *Massachusetts v. Laird*, 400 U.S. 886, 887-91 (1970). However, that argument came in a dissent to denial of certiorari in which no other members of the Court joined. Further, while the opinion did assert that the holding of *Massachusetts v. Mellon* should be

As a result of this federalism interest, which reduces most basically to the avoidance of state interference with

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reexamined in light of the recent liberalization of standing doctrine, *id.* at 889, it also implicitly recognized some force in the federalism rationale of *Mellon*. Justice Douglas argued that the case before him differed from *Mellon* in posing a lesser intrusion on the federal *parens patriae* power. Unlike *Mellon*, which challenged an act of Congress signed by the Executive, the very gist of the suit then before them was that the Vietnam War was not, properly speaking, an action of the Federal Government, because it had never been explicitly endorsed by Congress. *Id.* at 888.

At least two Courts of Appeals appear to have allowed states or territories to sue on a *parens patriae* basis. Most recently, the Ninth Circuit upheld, on *parens patriae* and proprietary grounds, the standing of a state utility commission to challenge an order of the FCC. *Washington Utility and Transportation Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975). That court, however, purported to recognize the continuing vitality of *Mellon* as a bar to state litigation of questions of distribution of powers between the State and the national government. *Id.* at 1153.

Our own court in two instances has allowed territories of the United States to attack rate decisions of the Federal Maritime Commission. *Guam v. FMC*, 117 U.S. App. D.C. 296, 329 F.2d 251 (1964); *Puerto Rico v. FMC*, 110 U.S. App. D.C. 17, 288 F.2d 419 (1961) (no discussion of standing). It is not entirely clear that either of these cases rests on a *parens patriae* theory. Further, the only discussion of standing in either case reaffirms the continuing authority of *Massachusetts v. Mellon* and *Minnesota ex rel. Lord v. Benson*. 117 U.S. App. D.C. at 297, 329 F.2d at 252.

Finally, there are a number of cases involving natural gas, in which states have been allowed to sue the Federal Power Commission. *E.g., Wisconsin v. FPC*, 373 U.S. 294 (1963); *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954); *California v. FPC*, 111 U.S. App. D.C. 226, 296 F.2d 348 (1961), *rev'd on other grounds*, 369 U.S. 482 (1962). These cases raise no question of *parens patriae* standing, since the Natural Gas Act itself provides for state standing to challenge FPC orders concerning natural gas. 15 U.S.C. §717d(a) (1970).

the exercise of federal powers, the cases evidence an extreme reluctance to recognize state *parens patriae* standing against a federal defendant. There is some basis for reading the preponderance of case law as flatly prohibiting such actions on the basis that there can be no quasi-sovereign interest in the state as a matter of constitutional allocation of powers. Whatever one's view of that proposition, however, *it is at least clear that suits against the Federal Government raise an important argument against standing which is not relevant where other types of defendants are involved.* That is because wherever there is a federal defendant, a degree of disruption of asserted federal powers at the hands of a plaintiff state is unavoidable. While the extent of the disruption and thus the weight of the federalism argument[56] will vary from one case to another, the applicability of the argument at all sharply dis-

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[56] It has been suggested that the constitutional nature of the challenge in *Massachusetts v. Mellon* was a critical element in the outcome of that case, and that suits challenging only the construction or application of a federal statute should be distinguished from it on that basis. *Washington Util. & Transp. Comm'n v. FCC*, 513 F.2d 1142, 1153 (9th Cir. 1975).

While, as a general proposition, it may be that non-constitutional challenges tend to be less disruptive than constitutional ones, which sometimes attack the legitimacy of an entire statute, there is no reason to suppose that this will always be true. Many constitutional challenges attack a statute not on its face, but as applied to a single set of facts, and in that respect are much like many non-constitutional actions. Further, the degree of interference and disruption occasioned by any suit is dependent on a variety of facts, and no single characteristic can logically be looked to as a basis for winnowing out the cases in which state standing should be granted.

tinguishes cases like the present one from the decisions cited by Petitioner involving a non-federal defendant.[57]

Further, most of the cases relied on by Petitioner involve state defendants, and many of those are distinguishable in another respect as well. In those instances where it is reasonably clear that some state interest is implicated,[58] the determination to grant standing is buttressed by the Supreme Court's constitutional duty to resolve interstate disputes. The combination of this pro-standing policy with the irrelevance of the anti-standing federalism concern for segregation of state and federal *parens patriae* functions, makes the logic of the interstate standing cases only marginally applicable to the situation before us.

C. *Standing of Pennsylvania To Challenge SBA Classification of Hurricane Agnes*

Pennsylvania seeks redress in this case for the injuries received by certain of its citizens and its economy as a whole, as a result of the allegedly illegal manner in which the SBA disaster relief was administered. While the rec-

[57] *See* cases cited, notes 32, 33, 34 *supra*.

[58] It appears to us that virtually all of the interstate dispute cases cited by petitioners fall within this category, because they implicate traditional quasi-sovereign interests in use of interstate waters and freedom from interstate pollution. *See* cases cited notes 32, 33 *supra*. The only interstate suit in which the asserted *parens patriae* interest was more questionable, because arguably wholly derivative from individual interests, was *Pennsylvania v. West Virginia*, in which the state sued on behalf of the economic interests of its citizens. It is noteworthy in that case that the granting of *parens patriae* standing was not essential to the holding of the case, since the Court also recognized an independent proprietary interest in the state. 262 U.S. at 565.

ord is not illuminating, it is our understanding that Agnes was a disaster of wide-ranging impact, whose physical effects were felt throughout much of the mid-Atlantic coastal region. It seems plausible that the dispersed effects of the disaster were felt in the economic condition of many small businesses, and that the manner of administration of SBA relief thus had direct importance for a significant number of small enterprises within the state.[59]

We need not and do not decide the difficult question of whether Pennsylvania would have standing if it were seeking somehow to represent the interests involved here against a private or state defendant. For in this case the uncertainty of that issue is made irrelevant by the presence of a federal defendant, and the fact that the suit was a direct attempt by a state to insert itself between the national government and the legitimate objects of its administrative authority. While we incline to the view that no asserted state interest in economy or welfare would support standing to challenge a program running directly between the Federal Government and the citizens, we limit our holding to the situation before us. In the face of the ambiguous state interest alleged by Pennsylvania, it seems clear that the state disruption of federal action implicit in granting state standing can not be tolerated here.

[59] Inasmuch as all of the physical injury involved in this case is injury to land and property caused by Hurricane Agnes, it may superficially appear that the action seeks vindication of some land-related quasi-sovereign interest of the state. The legal injury, however, has nothing to do with the hurricane's depredations, but relates instead to the alleged maladministration of the SBA relief effort. Thus in bringing suit, the state can not be said to seek relief from harm to some land-related quasi-sovereign interest of its own. *See* text accompanying note 31, *supra*.

The gist of the challenge in this case goes to the question whether Pennsylvania citizens received the type and amount of assistance to which they were entitled under the statute. However, Petitioner attempts to prove its case by delving into the administrative structure and internal procedures of the Small Business Administration, and argues, in essence, that the assistance must have been statutorily inadequate simply because it was administered in a particular way. We are not asked to rule that a particular *quantified* level of assistance is less than required by law. Rather, Petitioner asks us to infer from the SBA's Class B disaster classification and the concomitant regional administration of assistance that the relief given must have been less than the statute required.[60]

[60] *Brief of Petitioner* at 3-4.

The Government states unequivocally, the contrary claims of appellant Pennsylvania being conclusory and unsupported by any allegations of fact, that the agency's disaster classification had no unfavorable results for Pennsylvania. It is agreed that the difference between A and B classification is that under the B classification, given to Hurricane Agnes here, the disaster is administered by the Regional Administrator, not from Washington. But the locus of the administrative designation and the scene of command for the relief expedition has nothing whatever to do with the amount of the effort exerted by the Federal Government; nor does such relief headquarters and class designation have anything to do with the measure of assistance from various localities which can be called upon by the Federal Government. For example, the Government tells us here that over 900 people were brought into Pennsylvania from other states. The administrator of the overall relief effort was sent from Washington to Pennsylvania to administer the relief effort on the scene. If the disaster had been designated Class A, then the same administrator would have remained in Washington, presumably the same 900 people could have been sent in, and we see no apparent probable difference in the result.

We need not reach the merits of this alleged injury[61] to conclude that Petitioner's argument would take us very far into the internal workings of a federal agency. Indeed, it is difficult to imagine how a state could more substantially intrude itself into the operations of the Federal Government than by challenging agency activity on the sole basis that the agency chose to structure its effort in a particular way. The depth of this attempted invasion of matters traditionally reserved to broad agency discretion[62] weakens any claim of the state that it is a proper *parens patriae* representative of its citizen's interests in this mat-

Furthermore, on an overall review of the relative desirability of having relief efforts administered from Washington or from a command post sited locally, the Small Business Administration has concluded that it is almost invariably preferrable to have the relief effort directed locally. Since 1972 all disaster areas had been administered in the way Class B disasters were administered previously, *i.e.*, from the local scene, even though the chief relief administrator and outside help may have been sent from Washington.

There is nothing in the statute which deals with either Class A or Class B areas. This administrative agency classification has been discarded since 1972, in effect, the Class B type administration having been determined to be more fruitful and the Class A administration from Washington abandoned. *See* note 3 *supra*.

[61] It is commonly said that the merits of the case are not relevant in determining a party's standing to sue. *E.g., Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 153 (1970). This generalized principle clearly does not bar analysis of the factors we have considered; the interest offended, the character of the injury, *see Warth v. Seldin*, 422 U.S. 490, 500 (1975); and the presence of prudential considerations indicating that the plaintiff is not a proper representative of that interest against the defendant he has selected.

[62] *See* note 60 *supra*.

ter. The federalism interest in keeping separate the state and national *parens patriae* functions, which the Supreme Court has often recognized and never denied,[63] appears to us an overwhelming consideration, as would predominate even if the arguments in support of standing were more powerful than they are here. We therefore hold that Pennsylvania lacks *parens patriae* standing to bring this action.

We find nothing in the modern trend toward liberalized standing which weighs significantly against the conclusion we have reached. None of the recent standing cases in the Supreme Court touch upon the federalism question before us, and most do not raise the questions as to constitutional allocation of powers which arise in all suits against the national government. The single important exception to the latter statement is the area of taxpayer suits against the Federal Government. While it appeared for a time that *Flast v. Cohen,*[64] might signal a substantial relaxation of constraints on taxpayer challenges to government action, recent cases have elucidated relatively strict limits on the *Flast* doctrine.[65] We therefore do not read that line of cases to indicate that the federal interest in avoiding the disruption of litigation is now any less intense than it once was.

We are aware that the United States Court of Appeals for the Ninth Circuit has recently recognized *parens patriae* standing in a state utility commission to challenge a decision of the FCC bearing upon the operation of entities also regulated by the plaintiff.[66] Without expressing

[63] *See* notes 52-55 and accompanying text, *supra.*

[64] 392 U.S. 83 (1968).

[65] *Schlesinger v. Reservists to Stop the War,* 418 U.S. 208 (1974); *United States v. Richardson,* 418 U.S. 166 (1974).

[66] *Washington Util. & Transp. Comm'n v. FFC,* 513 F.2d 1142 (9th Cir. 1975).

any view as to the propriety of that decision, we note that it is distinguishable from our case in at least one important respect.[67] It was an action by a specialized utility[68] regulating agency of the state, dealing with matters within the expertise of that agency. The specialization of such an agency arguably befits it to stand in a *parens patriae* capacity for the citizenry on matters falling within its statutory mandate. It is conceivable that the agency's expertise makes it the best available representative of the plaintiff interests involved, and that the close interaction of state and federal regulation in the communications field renders less substantial the federalism interest in freedom from state intrusion. Thus even were the Ninth Circuit decision binding upon us, it would not compel a conclusion different from the one we have reached.

The District Court's dismissal of the action for failure to state a claim is *affirmed.*

[67] Arguably the case is distinguishable on the second ground that the court has found a proprietary as well as a *parens patriae* basis for standing. If this is true, the *parens patriae* basis may be non-essential to the court's holding. However, it is not clear from their discussion whether a separate proprietary interest exists, or whether the alleged proprietary interest is only the sort of quasi-sovereign interest that is necessary for a finding of *parens patriae* standing. *See id.* at 1149-52.

[68] It has also been suggested that utility cases raise specially compelling arguments in support of state standing. *Guam v. FMC,* 117 U.S. App. D.C. 296, 298, 329 F.2d 251, 253 (1964). We are unable to ascertain whether the standing granted in that case was on a proprietary or a *parens patriae* theory. In any event, by no stretch does the present case involve a utility, or a state utility regulating agency.

LUMBARD, *Circuit Judge* (dissenting): From June 21 to June 25, 1972, much of the eastern seaboard was ravaged by Hurricane Agnes, one of the worst natural disasters in the history of the United States. Pennsylvania, with a population in excess of 12 million people and the hardest hit of any state, here seeks to challenge the SBA's method of implementing federal relief programs in the Commonwealth, in the aftermath of devastation caused there by Agnes. The majority concludes that such a suit represents an untoward incursion into and usurpation of the federal sovereign power. I respectfully dissent.

The majority does not dispute, as indeed it could not, that the federal courts have in recent years been recognizing with increasing frequency the right of organizations to sue on behalf of their constituent members. See *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972). In *United States v. SCRAP,* 412 U.S. 669 (1973), for example, the Supreme Court held that "[v]arious environmental groups" had standing to attack ICC approval of a railroad rate surcharge which, plaintiffs alleged, would discourage the use of recyclable materials thereby adversely affecting the environment. In *Environmental Defense v. Hardin,* 428 F.2d 1093 (D.C. Cir. 1970), this court similarly concluded that the interest of consumers in obtaining review of a decision by the Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT, "may properly be represented by a membership association with an organizational interest in the program." 448 F.2d at 1027.

Nor does the majority contest the now well-settled proposition that the state, as *parens patriae,* may sue both private individuals, *Georgia v. Pennsylvania Railroad,*

324 U.S. 439 (1945), and other states, *Missouri v. Illinois,* 180 U.S. 208 (1901), to protect its quasi-sovereign interests. Nevertheless, relying on the precedent of *Massachusetts v. Mellon,* 262 U.S. 447 (1923), the court maintains that such suits cannot be countenanced when brought against the federal government.[1] I disagree.

In *Mellon,* Massachusetts alleged that a federal statute which conditioned a grant-in-aid upon voluntary compliance with a plan to reduce infant and maternal mortality constituted "an attempt to legislate outside the powers granted to Congress by the Constitution and within the

[1] Adherence to the *Mellon* doctrine has not been quite as unwavering as the majority opinion would suggest. In characterizing *New York v. United States,* 331 U.S. 284 (1947) as "the only case in which the Supreme Court has upheld state *parens patriae* standing to sue the Federal government," the court overlooks the decision in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), in which, after relying upon *Mellon* to dismiss South Carolina's due process and bill of attainder attacks on the Voting Rights Act of 1965, the Supreme Court proceeded to consider without comment the merits of South Carolina's Fifteenth Amendment challenge. The Court's action was viewed by many as a significant erosion of the *Mellon* principle. See Bickel, "The Voting Rights Cases," 1966 Supreme Court Review 79.

Moreover, as the majority recognizes, this Circuit has in the past sustained the attack by territorial governments on rate decisions of the Federal Maritime Commission. *Guam v. FMC,* 329 F.2d 251 (D.C. Cir. 1964). In *Guam,* the court distinguished *Mellon* on the ground that a rate challenge might be conceptually viewed as a controversy between the territory, as *parens patriae,* and private operators in which the federal government has simply been trapped as an intermediary, 329 F.2d at 252. This distinction, however, is disingenuous. Any utility rate approval or disapproval involves the most fundamental exercise of sovereignity in that it requires an identification and assessment of the public interest.

field of local powers exclusively reserved to the States," 262 U.S. at 482. In contrast, Pennsylvania's claim that the SBA erred in classifying the Commonwealth a Class B rather than Class A disaster area represents an effort to assure compliance with "the congressional will by preventing . . . a violation of [the Disaster Relief Act of 1970, 42 U.S.C. §4401, et seq.] by the administrative agency charged with its enforcement." *Washington Util. & Transp. Com'n v. FCC,* 513 F.2d 1142, 1153 (9th Cir. 1975).

Moreover, *Mellon* was decided in a far different era when standing was limited to the vindication of "legal rights." Those days are long since passed. *Data Processing Services v. Camp,* 397 U.S. 150 (1970), *Barlow v. Collins,* 397 U.S. 159 (1970). Indeed, in *Washington Utilities, supra,* the Ninth Circuit just recently concluded that the *Mellon* doctrine did not preclude a suit by a public commission of the State of Washington challenging the determination of the FCC that "the public interest, convenience and necessity" would best be served by authorizing the entry of new carriers into the specialized communications field. The majority endeavors to distinguish this squarely contrary holding by noting the "close interaction of state and federal regulation in the communications" area. But surely, the need for cooperation and coordination between state and federal governments is nowhere more obvious than in the administration of a massive disaster relief program.

The majority also seeks to dismiss in a footnote the contention that there is a valid distinction between a state's challenge to the constitutional authority of the central government to enact a given statute and an attack upon

the manner in which a concededly lawful statute is enforced and administered, see f.n. 56, *supra.* For me, however, this distinction is pivotal. The former is clearly and obviously a fundamental threat to the federal sovereign power; the latter seeks only to vindicate the will of the people as it has been expressed by their duly elected representatives in the national legislature.

At a time when suits such as the present one are routinely brought by private individuals and special interest groups, it makes little sense to deny Pennsylvania the right to test the propriety of actions by the SBA in bringing relief to thousands of the Commonwealth's citizens. There can be no doubt that with a natural disaster the size and scope of Hurricane Agnes, the state's interest in repairing the devastation to property within its borders and in accelerating the recovery of its economy is greater than the sum of the individual injuries suffered by its residents. See *Georgia v. Pennsylvania Railroad, supra,* at 450-51. In instituting this litigation, Pennsylvania has acted well within its *parens patriae* responsibilities.

I would reverse the order of the district court which dismissed the complaint on the ground that Pennsylvania has no standing to sue.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Civil Action 74-9

Commonwealth of Pennsylvania, by Milton J. Shapp, its Governor, et al.,

Appellants

v.

Thomas S. Kleppe, as Administrator of the Small Business Administration, et al.

Before: Lumbard*, Senior Circuit Judge for the Second Circuit; Tamm and Wilkey, Circuit Judges.

ORDER

On consideration of appellants' petition for rehearing, it is

Ordered by the Court that appellants' aforesaid petition is denied.

Per Curiam
For the Court:
(s) George A. Fisher
George A. Fisher
Clerk

Senior Circuit Judge Lumbard would grant appellants' petition for rehearing.

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* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

No. 76-130

In the Supreme Court of the United States

OCTOBER TERM, 1976

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

MITCHELL P. KOBELINSKI, ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22a-51a) is reported at 533 F. 2d 668. The order of the district court (Pet. App. 20a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1976. A timely petition for rehearing was denied on May 3, 1976 (Pet. App. 52a). The petition for a writ of certiorari was filed on July 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commonwealth of Pennsylvania has standing on its own behalf or as *parens patriae* to challenge the administration of a disaster relief program by the Small Business Administration.

STATEMENT

In June 1972, several eastern states, including Pennsylvania, were ravaged by the destructive winds and rain of Hurricane Agnes. President Nixon quickly designated Pennsylvania, Maryland and Virginia major disaster areas,[1] thereby making those states available for special assistance from the Small Business Administration.[2] On June 27, 1972, the SBA announced that it would furnish disaster relief to the devastated areas. 37 Fed. Reg. 13838. The SBA determined that relief efforts in the stricken areas should be directed locally rather than from Washington. It therefore announced that all of the affected areas, including Pennsylvania, would be classified as "Class B" disaster areas. Under the "Class B" designation, relief efforts were coordinated and supervised by the

[1]The designation was made pursuant to the provisions of the Disaster Relief Act of 1970, 84 Stat. 1745, 42 U.S.C. 4402(1). This Act has been supplanted by the Disaster Relief Act of 1974, 88 Stat. 143, 42 U.S.C. (Supp. IV) 5121 *et seq.*, which contains a similar authority for the designation of major disaster areas. 88 Stat. 144, 42 U.S.C. (Supp. IV) 5122(2).

[2]The assistance was made available pursuant to the provisions of 42 U.S.C. 4451 and 15 U.S.C. 636(b). The former provision is now codified at 15 U.S.C. (Supp. V) 636a. Under these provisions, the SBA is authorized to grant emergency loans to individuals and corporations who suffer property losses as the result of major disasters. See 13 C.F.R. 123.1.

SBA regional director in whose region the disaster took place.[3] Pet. App. 23a.

Dissatisfied with the manner in which SBA administered the disaster relief, and in part to enjoin discontinuance of such assistance, petitioner Commonwealth of Pennsylvania on January 3, 1974, filed this action on its own behalf and as *parens patriae* on behalf of all its citizens, alleging that the "Class B" designation was both arbitrary and illegal (Pet. App. 23a-24a). It was alleged that as a result of such classification Pennsylvania and its citizens had not received the necessary "professional S.B.A. personnel and administrative resources to effectively administer and deliver disaster recovery assistance * * *" (Pet. App. 7a).

Respondents filed a motion to dismiss on the ground that petitioner lacked standing to sue the United States either on its own behalf or as *parens patriae* (Pet. App. 24a). The district court dismissed the complaint "for lack of standing" (Pet. App. 20a). The court of appeals affirmed (Pet. App. 22a-51a).

[3]Prior to October 1972, the SBA employed two different methods for administering disaster relief. Under the first method, the "Class A" designation, relief aid was administered under the direction of the SBA Associate Administrator for Operations and Investments, Washington, D.C. Under the second method, the "Class B" designation, relief was administered under the direction of the SBA regional director in the area where the disaster occurred. The delegations of authority pertinent to the designations are published in the Federal Register. 36 Fed. Reg. 7290. The delegations of authority have no bearing on the amount of assistance provided to the stricken areas (Pet. App. 44a, n. 60), or on the priority assigned to the delivery of such assistance.

Since 1972, all disaster relief administered by the SBA has been handled by regional directors, that method of supervision having been found to be more efficient (Pet. App. 45a, n. 60).

ARGUMENT

1. In rejecting petitioner's[4] claim to standing based upon alleged injury to its proprietary interest (Pet. 13-15), the court of appeals correctly applied the test elucidated in *Data Processing Service* v. *Camp*, 397 U.S. 150, and *Warth* v. *Seldin*, 422 U.S. 490. As the court of appeals pointed out (Pet. App. 27a), petitioner's alleged injuries—that its ability to fulfill duties owed its citizens had been impaired and its tax revenues reduced—"do not satisfy the requirement of being arguably within the zone of interests protected by the Small Business Act."[5] The court reasoned (*ibid;* footnotes omitted):

> Unlike many federal assistance programs, no aid is authorized to be channelled through state agencies or coordinated with state programs. Nor do we find anything in the legislative history of the Act to indicate any concern for the well-being of the states as distinct political units.[6]

SBA's authority to grant disaster assistance extends to all victims of disasters who suffer damage or loss to their

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[4]We use "petitioner" throughout to refer to petitioner Commonwealth of Pennsylvania.

[5]The court also expressed doubt about whether the alleged injuries themselves were sufficient injuries in fact (see Pet. App. 28a-29a). The court found no nexus between the challenged administration and any impairment in petitioner's ability to care for its citizens or reduction in its revenues.

[6]The Ninth Circuit's decision in *Washington Utilities & Transportation Commission* v. *Federal Communications Commission*, 513 F. 2d 1142, is not to the contrary. There, an agency of the State of Washington was held to have standing on its own behalf to challenge an administrative decision of the Federal Communications Commission. But that case involved different allegations of injury under a different statute creating a different zone of interests. See p. 8, *infra*.

physical property. See 13 C.F.R. 123.1(a). The court of appeals incorrectly thought that relief was furnished only to small business concerns (see Pet. App. 27a). But the court's failure to recognize that individuals as well as businesses are protected by the disaster relief provisions does not detract from the validity of its conclusion that the Act was not designed to preserve any separate interests of the states in their political capacities.

2. The court of appeals, in a scholarly opinion upon which we principally rely (Pet. App. 29a-47a), correctly held that overriding concerns of federalism preclude recognition of petitioner's standing as *parens patriae* to challenge the administration of disaster relief by the Small Business Administration. The court acknowledged that the states may in some circumstances sue as *parens patriae* to defend certain causes in which they have a quasi-sovereign interest (Pet. App. 30a-35a). Standing to bring such suits depends in large part, however, on the identity of the defendant parties (Pet. App. 35a-42a). States may sue one another in *parens patriae* capacity, but different considerations pertain when the suit is against the federal government (Pet. App. 37a-38a):

> The individual's dual citizenship in both state and nation, with separate rights and obligations arising from each, suggests that both units of government act as *parens patriae* within their separate spheres of activity. The general supremacy of federal law gives some reason to conclude that the federal *parens patriae* power should not, as a rule, be subject to the intervention of states seeking to represent the same interest of the same citizens. In the terms used by the *parens patriae* cases, the state can not have a quasi-sovereign interest because the matter falls within the sovereignty of the Federal Government.

> The Supreme Court has repeatedly recognized (as a factor governing state standing) this interest of the Federal Government in the exclusivity of its *parens patriae* powers. The first and still dominant case in the field is *Massachusetts* v. *Mellon,* [262 U.S. 447] * * *.

See *Georgia* v. *Penn. R.R. Co.,* 324 U.S. 439, 447-448; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 324; *Jones, Governor, ex rel. Louisiana* v. *Bowles,* 322 U.S. 707. See also Bickel, *The Voting Rights Cases,* 1966 Sup. Ct. Review 79, 89.

In *Massachusetts* v. *Mellon,* 262 U.S. 447, 485-486, the Court denied Massachusetts standing to sue a federal official on behalf of its citizens, holding:

> While the State, under some circumstances, may sue [as *parens patriae*] for the protection of its citizens (*Missouri* v. *Illinois,* 180 U.S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.[7]

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[7]Petitioners would have this Court limit the holding in *Massachusetts* v. *Mellon* to cases involving challenges to the constitutionality of a federal statute. But such a limitation cannot be inferred from the Court's language, nor can it be found in any subsequent opinions of this Court. Furthermore, the distinction petitioners draw is not logical. If the states cannot challenge the federal government in areas where it is not competent to act (as may be the case if Congress passes an unconstitutional law), then certainly the states cannot challenge federal actions in areas that properly fall within federal authority. Moreover, if avoiding

Petitioner's suit challenging the administration of the SBA program constitutes a substantial interference with the federal government's own representation of its citizens' interests. Petitioner challenges the internal procedures used by a federal agency in administering a federal program for the aid of individuals and small businesses, "matters traditionally reserved to broad agency discretion" (Pet. App. 44a-45a). Petitioner sought to interject itself into the operation of the federal program, to insert itself "between the national government and the legitimate objects of [federal] administrative authority" (Pet. App. 43a). As the court of appeals stated (Pet. App. 45a-46a; footnote omitted):

> [I]t is difficult to imagine how a state could more substantially intrude itself into the operations of the Federal Government than by challenging agency activity on the sole basis that the agency chose to structure its effort in a particular way. The depth of this attempted invasion of matters traditionally reserved to broad agency discretion weakens any claim of the state that it is a proper *parens patriae* representative of its citizen's interests in this matter.

The court of appeals therefore correctly concluded that "[i]n the face of the ambiguous state interest alleged by Pennsylvania, it seems clear that the state disruption of federal action implicit in granting state standing can not be tolerated here" (Pet. App. 43a).

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disruption of the federal government is a factor militating against these state actions, the disruption is likely to be equally great in nonconstitutional cases. See Pet. App. 41a, n. 56. See also *State of Minnesota ex rel. Lord* v. *Benson,* 274 F. 2d 764 (C.A. D.C.); *State of Idaho ex rel. Robson* v. *First Security Bank,* 315 F. Supp. 274 (D. Idaho).

This result does not conflict with the holding in *Washington Utilities & Transportation Commission* v. *Federal Communications Commission, supra.* That case was considered by the court of appeals, which noted that "it is distinguishable from our case in at least one important respect" (Pet. App. 47a). The court explained (*ibid.*; footnote omitted):

> It was an action by a specialized utility regulating agency of the state, dealing with matters within the expertise of that agency. The specialization of such an agency arguably befits it to stand in a *parens patriae* capacity for the citizenry on matters falling within its statutory mandate. It is conceivable that the agency's expertise [made] it the best available representative of the plaintiff interests involved, and that the close interaction of state and federal regulation in the communications field renders less substantial the federalism interest in freedom from state intrusion. Thus even were the Ninth Circuit decision binding upon us, it would not compel a conclusion different from the one we have reached.

Moreover, in *Washington Utilities & Transportation Commission,* the Ninth Circuit noted that "any adverse impact of the FCC order on intrastate telephone rates would probably be so indirect, and take place so gradually, that individual users of intrastate telephone service would be unaware of it, or, in any case, would have inadequate incentive to incur the expense of judicial review." 513 F. 2d at 1152. In contrast, the interests petitioner seeks to represent—those of individuals who suffered substantial, discrete injuries as a result of Hurricane Agnes—are "no more than a reflection of injuries to the 'business or property of [individuals], for which they may recover themselves * * * ." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264.[8]

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[8]Furthermore, the holding with respect to *parens patriae* standing in *Washington Utilities & Transportation Commission* was in the nature of *dictum*, for the court had already held on the basis of the peculiar facts there that the state agency "has standing in its own right to secure judicial review of this FCC order." 513 F. 2d at 1152. As Judge Wallace said, in his concurring opinion, "the *parens patriae* reasoning [is] unnecessary to decide this case * * * ." 513 F. 2d at 1169.

3. In any event, further review of petitioner's standing claims is not warranted in view of the insubstantiality of its underlying contention: although petitioner's suit is based upon the allegation that it and its citizens were entitled to a "Class A" designation in the wake of Hurricane Agnes, petitioner's complaint does not contain a single factual allegation showing how the "Class B" administrative designation operated to its detriment or the detriment of its citizens. To the contrary, that designation in no way detracted from the effective and expedient delivery of disaster relief. See Pet. App. 44a-45a, n. 60. Furthermore, the underlying issue presented has no prospective significance: the distinction in administrative designations between "Class A" and "Class B" disaster areas was abolished in October 1972 (see note 3, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1976.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-130

COMMONWEALTH OF PENNSYLVANIA, by MILTON J. SHAPP, its Governor, et al.,

Petitioners,

v.

THOMAS S. KLEPPE, AS ADMINISTRATOR of the SMALL BUSINESS ADMINISTRATION, et al.,

Respondents.

FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE STATE OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PENNSYLVANIA'S PETITION

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BRIEF FOR THE STATE OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PENNSYLVANIA'S PETITION

This brief is submitted pursuant to Rule 42(4) of the Court's Rules by the States of New York, Alabama, Arkansas, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, Wyoming, and the Commonwealths of Massachusetts and Virginia and Territory of Guam, in support of the petition of the Commonwealth of Pennsylvania to obtain a writ of certiorari to review the opinion and judgment of the Court of Appeals for the District of Columbia entered on March 4, 1976.

Interests of the *Amici Curiae*

Each of these *Amici* is a sovereign state of the United States with a substantial interest in supporting Pennsylvania's petition for a writ of certiorari in this matter. The *Amici* are concerned with this action because the issues involved bear directly on their rights as states to protect their quasi-sovereign interests. The *Amici* believe that the decision of the Court of Appeals, which held that Pennsylvania lacked standing to seek relief as *parens patriae* for the harm caused its citizens by the unlawful administrative actions of certain federal officials, seriously and unduly restricts the well established right of states to utilize *parens patriae* lawsuits as a means for protecting the general welfare of their inhabitants.

This Court has long recognized the right of a state to sue as *parens patriae* to protect its quasi-sovereign interests. *Missouri* v. *Illinois,* 180 U.S. 208 (1901). Indeed, "[i]t has . . . become settled doctrine that a State has standing to sue [as *parens patriae*] only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania* v. *New Jersey,* 44 U.S.L. Week 4916, at 4917 (U.S. June 17, 1976). Included among the quasi-sovereign interests that a state may properly represent are the general health and welfare of its citizens and the continuing prosperity of its economy. *Georgia* v. *Pennsylvania Railroad Co.,* 324 U.S. 439 (1945); *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923); *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907). The Court most recently reaffirmed this principle in *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251 (1972), where it was noted that "[t]he nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England" (405 U.S. at 257).

The decision of the Court of Appeals holding that a state may not act as *parens patriae* to challenge unlawful administrative action of federal officials is therefore of special concern to the *Amici.* It places a narrow, restrictive interpretation upon traditional *parens patriae* concepts at the very time that the interests of local state governments require a strengthening and expanding of those concepts. Moreover, it comes in a period when traditional notions of standing in general have been considerably relaxed. *United States* v. *SCRAP,* 412 U.S. 669 (1973); *Sierra Club* v. *Morton,* 405 U.S. 727 (1972); *Data Processing Services* v. *Camp,* 397 U.S. 150 (1970); *Flast* v. *Cohen,* 392 U.S. 83 (1968).

Questions Presented

1. When the unlawful action of a federal agency causes harm or threatens injury to a state's quasi-sovereign interests, is the state precluded from bringing a *parens patriae* suit against the agency, where the suit does not challenge the Constitutional power of the Federal Government, but only seeks relief against the agency's unlawful actions?

2. Can a state be denied *parens patriae* standing to sue in any case where its quasi-sovereign interests are clearly established?

Statement of the Case

The Commonwealth of Pennslyvania has presented a full statement of the case in its Petition. For the broader overview which *Amici* take, the relevant facts can be succinctly stated.

Hurricane Agnes ravaged much of the eastern seaboard from June 21, 1972 to June 25, 1972. It was one of the worst natural disasters in the history of the United States.

Pennsylvania and its citizens suffered losses unparalleled in the history of that state and unparalleled by the devastation in other states. The Small Business Administration (SBA) was charged with the responsibility, pursuant to 15 U.S.C. § 631, of providing necessary assistance and disaster relief to those eligible persons and entities that had suffered losses as a result of the hurricane. In accordance with an internal classification system maintained by the SBA, whereby disasters are rated as either "A" or "B" disasters, Pennsylvania was classified as a "B" disaster area. Pennsylvania alleges that the SBA afforded top priority to "A" disasters and that those disasters receiving the "B" classification were accorded substantially lesser priority. As a result of the "B" classification it received, Pennsylvania alleges that SBA officials denied the state and its citizens the requisite professional personnel and administrative resources necessary to effectively administer and deliver disaster recovery assistance within the state. Pennsylvania further alleges that the SBA had classified other disasters as "A" which were, comparatively, minor and of significantly less impact than Hurricane Agnes. It is charged that this discriminatory classification and treatment of Pennsylvania caused harm and injury to its citizens, that it was not authorized by law, that it was done for the personal political reasons of the SBA Administrator, and that it was directly contrary to the Administrator's legally imposed duties.

The complaint in the action was filed against the SBA and its officials primarily to prevent the dismantling of SBA flood relief operations in Pennsylvania and to obtain a reopening of the SBA disaster relief loan program within that state. In addition to bringing the action on behalf of itself and upon relation of four named individuals harmed by the unlawful conduct of the SBA officials, Pennsylvania brought the action as *parens patriae* for all of its citizens, taxpayers, and residents. The District Court dismissed the action for lack of standing, and the

Court of Appeals, over the dissent of Senior Judge Lumbard, affirmed.

Reason for Granting the Writ

The decision of the D.C. Circuit is in direct conflict with a recent decision of the Ninth Circuit and is contrary to prior decisions of this Court

In denying Pennsylvania standing to sue, the majority opinion relied principally upon this Court's decision in *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923), wherein it was stated that the United States, and not the state, represents a state's citizens as *parens patriae* in their relation with the federal government. While conceding that it was debatable whether that decision bars all state *parens patriae* suits against the federal government, the majority nevertheless held that *Mellon* makes clear that the federal interest will generally predominate. Turning its attention to the instant case, the Court of Appeals found that Pennsylvia's interest in the maladministration of the SBA disaster relief effort was too ambiguous to overcome the overwhelming federalism interest in preventing the undue disruption of federal powers and in keeping separate the state and national *parens patriae* functions.

The decision of the D.C. Circuit in this case denying Pennsylvania standing to challenge the maladministration of SBA relief efforts in that state is in direct conflict with the recent decision of the Ninth Circuit in *Washington Utilities & Transportation Commission* v. *FCC,* 513 F.2d 1142 (9th Cir.), *cert. denied,* 96 S. Ct. 62 (1975). In the latter case the Ninth Circuit concluded that the *Mellon* doctrine did not preclude a suit by an agency of the State of Washington challenging a determination of the Federal Communications Commission. As Judge Lumbard noted in his dissent below, this is a "squarely contrary holding" to that in the instant case (Slip Op., dissent, p. 5).

In *Washington Utilities,* it was alleged that the challenged FCC action would result in an increase of intrastate telephone rates and that a substantial portion of Washington's citizens would be affected thereby. The Ninth Circuit first determined that the necessary quasi-sovereign interest was present. The Court found that the state had an interest independent of its citizens consisting in "communication vital to the economic and social well-being of the community as a whole." *Washington Utilities & Transportation Commission* v. *FCC, supra,* at 1152. It then determined that none of the considerations that have justified restrictions upon the power of a state to represent the interests of its citizens as *parens patriae* were present in the case.

> The original jurisdiction of the Supreme Court is not invoked, and the availability of a remedy need not be restricted by the necessity of husbanding that court's limited resources. Since no state is sued, there is no threat of circumvention of the Eleventh Amendment. [citations omitted] Since no damages are sought, there is no risk of duplicating recoveries. [citation omitted] Since no absent persons will be barred from a remedy otherwise available if this petition is entertained, the proceeding is not subject to criticism as a substitute for a class action without its safeguards. [citations omitted] (513 F.2d at 1152-53)

Finally, the Ninth Circuit held that the doctrine of *Massachusetts* v. *Mellon* was not applicable to the situation before it. Unlike *Mellon,* where Massachusetts sought to litigate a "question of distribution of powers between the State and the national government," *Georgia* v. *Pennsylvania Railroad,* 324 U.S. 439, 445 (1945), and "protect her citizens from the operation of federal statutes," *Id.,* at 447, the Court noted that

> [Washington] does not attack the constitutionality of the Communications Act on any ground; rather it relies upon the federal statute, and seeks to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement. (513 F.2d at 1153)

The position of the State of Washington in the *Washington Utilities* case and that of the Commonwealth of Pennsylvania in the instant case are virtually identical. There is no sound basis upon which to distinguish the holdings in the two cases.

More importantly, a comparison of the opinion in *Washington Utilities* with that of the majority opinion below reveals that there is a basic irreconcilable conflict between the Ninth Circuit and the D.C. Circuit with respect to the way in which each court views the question of *parens patriae* standing. As noted above, the Ninth Circuit found that such standing existed, apart from any consideration of the *Mellon* doctrine, upon a showing of the necessary quasi-sovereign interest and an absence of any of the traditional reasons for restricting state *parens patriae* standing that have been advanced in cases brought under this Court's original jurisdiction, *See The Original Jurisdiction Of The United States Supreme Court,* 11 Stan. L. Rev. 665 (1959), or in connection with cases where states have attempted to represent the individual proprietary interests of their citizens outside the confines of a class action. *California* v. *Frito-Lay, Inc.,* 474 F.2d 774 (9th Cir. 1973). The majority opinion below, however, holds that *parens patriae* standing is not solely dependent upon the kind of injury alleged (*i.e.,* whether the harm is such as will give rise to a quasi-sovereign interest), but also on the identity of the defendant parties against whom the action is brought.

Thus, in the view of the majority below, "significant policy concerns, *apart from the injury itself,* become rele-

vant in determining the state's fitness to bring suit," (Slip Op., pp. 14, 15) (emphasis added). The majority notes that the presence of a state defendant provides added impetus to find standing to sue, because there is a clear policy which favors the resolution of interstate disputes. On the other hand, in actions against non-state defendants, where the resolution of interstate controversies are not at issue, analysis might indicate that standing should be denied, "even if the interest to be represented seems superficially similar to that held an adequate basis for standing in an interstate suit," (Slip Op., p. 16).

In short, the majority's approach to the question of *parens patriae* standing would focus the inquiry upon the perpetrator of the injury and away from the nature of the harm to the general welfare. Thus, even where the injury is substantial and the state's quasi-sovereign interest is otherwise clear, standing could still be denied.

The *Amici* contend that this view of *parens patriae* standing conflicts, not only with the views of the Ninth Circuit expressed in *Washington Utilities,* but also with the views expressed by this Court in every case in which *parens patriae* standing has been upheld. This Court has never denied standing to sue where the appropriate quasi-sovereign interest has first been demonstrated.

Thus, for example, in *Missouri* v. *Illinois,* 180 U.S. 208 (1901), where Missouri sought to enjoin the pollution of the Illinois River by the State of Illinois, *parens patriae* standing was upheld because it was clear that Missouri had an interest in protecting the health and prosperity of its towns and cities against the pollution's threatened hazards. "[I]t must surely be conceded," said the Court, "that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." *Id.* at 241. Similarly, *parens patriae* standing was upheld in *Kansas* v. *Colorado,* 206

U.S. 46 (1907), where Kansas challenged the diversion of the Arkansas River by Colorado. The Court noted that the controversy involved "a matter of state interest, and must be considered from that standpoint." *Id.* at 99. In *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907), Georgia sought to enjoin the discharge of noxious gases over its territory. After finding that Georgia had "an interest independent of and behind the titles of its citizens, in all the earth and air in its domain," *Id.* at 237, the Court declared that "demands of this sort, on the part of a State, for relief from injuries analogous to torts . . . *must be recognized,* if the grounds alleged are proved • • •," *Id.* (emphasis added). In *New York* v. *New Jersey,* 256 U.S. 296 (1921), the Court upheld New York's interest in preventing the pollution of its waters, noting that "[t]he health, comfort and prosperity of the people of the State [of New York] and the value of their property being gravely menaced . . . the State is the proper party to represent and defend such rights • • •," *Id.* at 301-302. Likewise, in *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923), the Court upheld the standing of Pennsylvania and Ohio to challenge West Virginia's interference with the flow of natural gas into their territories. The Court found that the two states had an interest in protecting the health, comfort and welfare of their citizens from the threatened withdrawal of natural gas from the interstate stream. It stated that

> [t]his is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected [which] is not merely a remote or ethical interest but one which is immediate and recognized by law. (*Id.* at 592)

Finally, in Georgia v. *Pennsylvania Railroad,* 324 U.S. 439 (1945), the Court upheld Georgia's standing to seek relief for injury to her economy and to the general welfare of

her citizens caused by discriminatory shipping rates. It noted that

> Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. (*Id.* at 451)

The rule which emerges from the foregoing line of cases is that a state may properly assert *parens patriae* standing in any action where the injury alleged is shown to affect the general public welfare of its citizens. It is clear that *parens patriae* standing in such cases is not in any way dependent upon the identity of the defendant parties against whom the action is brought, but solely upon the nature of the harm alleged. To the extent that the Court of Appeals decision holds otherwise, it is in conflict with the prior decisions of this Court.

The *Amici* further contend that the Court of Appeals decision is in conflict with the decisions of this Court in *Oregon* v. *Mitchell,* 400 U.S. 112 (970); *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966); and *New York* v. *United States,* 65 F. Supp. 856 (NDNY 1946), *aff'd* 381 U.S. 284 (1947), in each of which cases state standing to sue the federal government on behalf of proper quasi-sovereign interests was not questioned.

It is important, therefore, that a writ of certiorari be granted in this case. The decision of the Court of Appeals for the D.C. Circuit in the instant case is in direct conflict with the views of the Ninth Circuit and is also contrary to principles laid down by this Court in several prior cases. It is important to the *Amici,* and to the interests of federalism, that these conflicts be resolved.

CONCLUSION

For all of the reasons set forth above, *Amici* respectfully request that a writ of certiorari issue to the Court of Appeals for the District of Columbia to resolve a serious issue of federalism that is of grave importance to the states and the general welfare of the citizens they represent.

Respectfully submitted,

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